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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X
:
UNITED STATES OF AMERICA CR-13-607

-against- : United States Courthouse
PHILLIP A. KENNER and Central Islip, New York
TOMMY C. CONSTANTINE,

Defendants. : April 6, 2015
- - - - - X 10:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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For Mr. Kenner

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For the Defendants:

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For Mr. Constantine

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Proceedings recorded by mechanical stenography.
Transcript produced by computer.

Mary Ann Steiger, CSR
Official Court Reporter

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1 THE CLERK: All rise

2 THE COURT: Please be seated.

3 THE CLERK: Calling case 13-CR-607, U.S.A. vs.
4 Kenner and Constantine.

5 Counsel, please state your appearances for the
6 record.

7 MS. LEONARDO: For the United States, Diane
8 Leonardo and Madeline O'Connor, Assistant United States
9 Attorneys.

10 Good morning, your Honor.

11 THE COURT: Good morning.

12 MR. HALEY: Richard Haley, for the defendant
13 Phil Kenner. Phil is to my left.

14 THE COURT: Good morning.

15 MR. CONWAY: Good morning, your Honor.

16 Joseph Conway and Andrew Oliveras for Mr. Tommy
17 Constantine, who is right here.

18 THE COURT: Good morning.

19 Both defendants are present.

20 This is the continuation of the forfeiture
21 hearing.

22 Mr. Kenner, if you would retake the stand,
23 please.

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1 PHIL KENNER,

2 called as a witness, having been previously
3 duly sworn, was examined and testified further
4 as follows:

5

6 THE COURT: I remind you, Mr. Kenner, that you're
7 still under oath; do you understand?

8 THE WITNESS: Yes, sir.

9 MS. LEONARDO: Your Honor, before I start
10 questioning Mr. Kenner, we just wanted to move into
11 evidence several of Mr. Kenner's prior deposition
12 transcripts.

13 THE COURT: Okay.

14 MS. LEONARDO: I believe Mr. Conway did not have
15 an objection, and Mr. Haley did have an objection to that.

16 THE COURT: Okay.

17 These are depositions from the civil litigation?

18 MS. LEONARDO: Yes, your Honor.

19 MR. HALEY: Your Honor, my only objection is
20 this, and perhaps we can resolve it following my client's
21 testimony.

22 I don't know specifically what portions of the
23 deposition transcripts they wish to introduce. There are
24 limited issues in this hearing. To the extent they
25 address the limited issues, and I see the relevance and

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1 materiality to it, I would have no objection. To the
2 extent they simply want to say, here's a deposition
3 transcript of Mr. Kenner regarding prior testimony, I
4 can't commit to that at this point.

5 THE COURT: So basically you want to reserve any
6 relevancy objection depending on what they are pointing
7 to?

8 MR. HALEY: Yes, sir.

9 I say that, your Honor, simply based upon what
10 occurred the other day when we spoke about, at least for
11 purposes of the forfeiture hearing, what may or may not be
12 relevant issues.

13 THE COURT: Okay.

14 I'll admit the transcripts with the
15 understanding that Mr. Haley is reserving the right to
16 make an objection to relevancy depending upon what
17 particular portion of the transcript the government either
18 questions Mr. Kenner on or refers to the Court for its
19 consideration.

20 MR. HALEY: Thank you.

21 MS. LEONARDO: Your Honor, just for the record,
22 what I did was made copies for counsel of the first page
23 with the exhibit number on it instead of producing
24 thousands of pages of deposition, and I did that for the
25 Court, your Honor.

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1 For the record, your Honor, Exhibit 97 would be
2 the deposition in Kenner v. Myerick.

3 Exhibit 98 would be the deposition of Mr. Jowdy
4 in DeVries v. Jowdy.

5 Exhibit 99 is a depositions of Mr. Kenner in
6 Little Isle v. Jowdy.

7 Exhibit 100 is Mr. Kenner's testimony before the
8 SEC.

9 Exhibit 101 is Mr. Kenner's testimony in Nolan
10 v. Kenner, the arbitration proceeding.

11 Exhibit 102 is the deposition of Mr. Kenner in
12 Murray v. Jowdy.

13 And 103 is Mr. Kenner's testimony in Baja
14 Ventures v. Diamante Cabo San Lucas.

15 THE COURT: What was 98? I thought you said it
16 was Mr. Jowdy's deposition. It's Mr. Kenner's deposition?

17 MS. LEONARDO: Your Honor, I believe back on
18 March 9th, Mr. Haley introduced a portion of Mr. Jowdy's
19 deposition and your Honor indicated that you would review
20 the entire transcript under the rule of completeness.

21 THE COURT: That is Mr. Jowdy's?

22 MS. LEONARDO: That is, your Honor. I have a
23 copy for your Honor.

24 MR. HALEY: For purposes of the record, what was
25 physically handed to me prior to your Honor taking the

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1 bench was Government's Exhibit F0RF-80. That was
2 physically handed to me about 15 minutes ago.

3 As relates to the exhibits that the government
4 now has proffered to the Court, that was just given to me
5 just this very moment.

6 So, indeed, I'm being asked -- I know your Honor
7 is allowing me to reserve my objections as to relevance
8 and materiality.

9 I would simply like to point out I'm just given
10 these exhibits now as they're being offered to the Court
11 without the chance to review them before they submit them
12 to the Court.

13 THE COURT: I understand that. There's no
14 authenticity issues.

15 MR. HALEY: No, sir.

16 THE COURT: I have only the first page of the
17 transcript. I can't consider what's in there either.

18 So I assume at some future point, either during
19 Mr. Kenner's testimony today or in the government's
20 supplemental briefing, they're going to point to certain
21 portions of the depositions that they think are relevant
22 and I'll give you a chance to respond.

23 MR. HALEY: Thank you.

24 MS. LEONARDO: We have previously provided the
25 deposition transcripts to counsel. I wanted to avoid

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1 handing them a thousand pages in 10 binders.

2 For the record, Forfeiture Exhibit 80 was
3 introduced in evidence on Monday and counsel had no
4 objection to that on Monday.

5 MR. HALEY: I still have no objection to Exhibit
6 80, Judge.

7 THE COURT: Okay. 80 is in. Okay. Let's
8 continue.

9 MS. LEONARDO: Thank you, your Honor.

10 (Government Forfeiture Exhibits 97 through 103
11 in evidence.)

12

13 CROSS-EXAMINATION

14 BY MS. LEONARDO:

15 Q. Mr. Kenner, you testified on Monday with regard to
16 your acquiring an interest in Baja Ventures; do you
17 remember that?

18 A. Yes.

19 Q. Could you just describe for me again the first time
20 you approached Mr. Lehtinen and Mr. Stumpel with regard to
21 this investment?

22 A. I had spoken with both of them independently on the
23 phone, and suggested that there's an opportunity to invest
24 through a debt offering to loan money during the
25 acquisition process of the Diamante Cabo San Lucas

Kenner - Cross/Leonardo

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1 project, and both independently agreed to do so.

2 Shortly thereafter, Mr. Jowdy had defaulted on
3 Mr. Lehtinen's initial agreement and, at that point, I
4 contacted Mr. Lehtinen and let him know what was going on,
5 and that pursuant to the letter agreement Mr. Jowdy had
6 provided Mr. Lehtinen, I was going to include him as a
7 guarantee in the equity position that I was going to
8 acquire in the future.

9 At that point I felt it was only fair to do the
10 same to Mr. Stumpel, so I contacted him as well.

11 Mr. Jowdy did make one interest payment to
12 Mr. Stumpel, but did not fulfill his agreement with
13 Mr. Stumpel either, so we created the Baja Ventures
14 promissory contracts which then, when Mr. Jowdy, in or
15 about February 19 of 2006, informed me that he was not
16 going to be able to pay those two gentlemen back, I
17 indicated the other day that I instructed Mr. Najam and
18 Mr. Markowitz to create Baja Ventures 2006, which I
19 believe was on February 23rd, 2006, that Mr. Markowitz did
20 initiate the single purpose entity in Delaware.

21 Q. I believe you just testified that you were going to
22 include either or both Lehtinen and Stumpel in your equity
23 position; is that what you said?

24 A. That was my guarantee to them once Mr. Jowdy had
25 initially defaulted on his original promise.

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1 Q. How were you going to acquire your equity position
2 outside of Lehtinen's and Stumpel's debt agreement, how
3 are you acquiring your interest?

4 A. I was initially going to do it with my own cash
5 position.

6 Q. With what? The what? What did you say?

7 THE COURT: With his own cash position.

8 THE WITNESS: Yes, sir.

9 BY MS. LEONARDO:

10 Q. What was the cash you were intending to put in?

11 A. That hadn't been concluded yet; but, at that point,
12 it was somewhere -- I would guess it was somewhere in the
13 neighborhood of a million-and-a-half dollars.

14 Q. Where were you getting a million-and-a-half dollars
15 cash to put in the equity interest?

16 A. From monies owed to me.

17 Q. From monies owed to you?

18 A. Primarily from Mr. Jowdy.

19 Q. And those were monies that were owed to you
20 personally?

21 A. Yes, that is correct.

22 Q. And Stumpel's and Lehtinen's money didn't go through
23 separate from Little Isle loans to Mr. Jowdy?

24 A. I didn't understand what you just said.

25 Q. Mr. Lehtinen's and Mr. Stumpel's monies were separate

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1 from Little Isle monies that went to Mr. Jowdy; is that
2 right?

3 A. That's correct.

4 Q. Now, I think you testified on Monday that
5 Mr. Lehtinen transferred \$1.5 million directly to
6 Mr. Jowdy; is that correct?

7 A. That is correct.

8 Q. And that went to Propiedades, the Propiedades
9 account?

10 A. Yes, it did.

11 Q. Did you make that transfer on behalf of Mr. Lehtinen,
12 or did he make that transfer himself?

13 A. I made it as an authorized transfer with my power of
14 attorney that I have on Mr. Lehtinen's account in Charles
15 Schwab at the time.

16 Q. So you used your power of attorney authority to
17 transfer Mr. Lehtinen's money to Propiedades, correct?

18 A. That is correct.

19 Q. And with regard to Mr. Stumpel's 956,000, that went
20 to Ula Makika first, correct?

21 A. Correct.

22 That was a brand-new account that was set up.

23 Q. Ula Makika was set up to be a buffer between your
24 Little Isle clients and any loans; is that right?

25 A. That is not correct.

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1 Q. It was set up as kind of some kind of buffer; is that
2 correct?

3 A. That is also not correct.

4 Later it was suggested to me to be used as a
5 buffer. The account was set up for me to deal with a
6 different business transaction I was looking to do.

7 Q. Mr. Kenner, you testified at the SEC that Ula Makika
8 was specifically set up to be a buffer so your hockey
9 player clients wouldn't get involved in any kind of
10 litigation stemming from these loans; isn't that correct?

11 A. I don't believe that is factually accurate.

12 I believe it is consistent with the fact that I
13 used Ula Makika in order to create a buffer company
14 advised by my attorney, one of my attorneys at the time,
15 in order to avoid dragging in any of the Little Isle
16 members into future litigation if not necessary.

17 Q. Which attorney advised you to do that?

18 A. I had several attorneys advise me; Mr. Markowitz
19 advised me, Mr. Najam advised me, the Mexican attorney,
20 Fernando Garcia also advised me.

21 Q. Well, Larry Markowitz was your attorney; is that
22 correct?

23 A. He represented me and all of the Hawaiian entities.

24 Q. When Mr. Stumpel's money was transferred to Ula
25 Makika, did you do that transfer or did he do that

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1 transfer?

2 A. No, I did, using my power of attorney at Charles
3 Schwab that I had at the time.

4 Q. Did you follow-up that power of attorney transfer by
5 notifying Mr. Stumpel and Mr. Lehtinen that that was in
6 fact occurring?

7 A. They were clearly aware that it was done because they
8 authorized me to do the transfer.

9 Q. Did you follow it up with an e-mail or a fax to them
10 confirming that you accessed your power of attorney over
11 their accounts to transfer funds?

12 A. Each of the power of attorney wire transfer requests,
13 after it was signed and sent to Charles Schwab, it was my
14 typical practice to forward them also on to the clients.

15 Q. As you sit here today, do you recall if you did that?

16 A. Absolutely. I did that for each and every one of the
17 times I used the power of attorney for any one of my
18 clients from the time I was given power of attorney until
19 the time all the Schwab accounts were closed.

20 Q. So are you saying every time you -- withdrawn.

21 With regard to Mr. Stumpel's money, once it went
22 to Ula Makika, then you sent it on to the seller in Cabo;
23 is that correct?

24 A. Yes, that's correct.

25 Q. You, in fact, were the only person on the account for

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1 Ula Makika, right?

2 A. Yes, that's correct.

3 Q. When you accessed other clients' line of credit
4 money, for example from Northern Trust, did you have power
5 of attorney on those account?

6 A. I had written authorization that Northern Trust bank
7 had prepared and independently sent to each one of the
8 line of credit holders granting me access to transfer
9 funds from the line of credit to Little Isle IV, and the
10 use of funds was governed by the active operating
11 agreement for Little Isle IV at the time.

12 Q. So any time you accessed a client's account, a line
13 of credit account, you didn't notify them; is that right?

14 A. No, I wasn't required to.

15 The authorization was a blanket authorization to
16 use the funds for the investment. The commitment of the
17 line of credit was the capital contribution investment for
18 each of the individuals into Little Isle IV.

19 There was no subsequent authorization required
20 by the client. It was a blanket authorization that was
21 created by the bank and sent to the individual client and
22 returned independently by the client to the bank.

23 Q. So, Mr. Kenner, as your client's financial advisor,
24 you saw no need to notify them that you were accessing
25 their line of credit account for upwards of millions of

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1 dollars?

2 A. They were clearly aware that their accounts were
3 accessed because consistent with the subpoena that was
4 returned to us during in or about week 9 or 10 of the
5 trial, in each one of the records from Mr. Nolan, Mr. Peca
6 Mr. Rucchin, Mr. Berard, and a partial return subpoena for
7 Mr. Sydor, there are disbursement requests and
8 authorization forms that were signed at a minimum once a
9 year that showed the clients what funds had been disbursed
10 from their lines of credit and what had been used.

11 In addition, the extension of credit document
12 was signed by each of the individuals which clearly laid
13 out either that it was an investment in Little Isle IV
14 consistent with a capital contribution, and/or it was an
15 investment in quotes speculative real estate on each of
16 those documents. Each of those were one page documents,
17 so it was very apparent when they signed the document what
18 they were signing.

19 Q. So, Mr. Kenner, my question to you was on occasion
20 when you accessed your clients' line of credit at Northern
21 Trust, you didn't specifically tell them on that day, did
22 you?

23 A. No, I did not.

24 I wasn't required to do so by the authorization
25 they granted me.

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1 Q. My question is, you didn't do it; is that correct?

2 A. No, ma'am, I didn't notify them because it wasn't
3 required as part of the authorization they had signed.

4 MS. LEONARDO: Your Honor, I know you will
5 overrule me, but I would ask that the witness just answer
6 the question.

7 MR. HALEY: The question implies some sort of
8 wrongdoing on the part of my client.

9 I respectfully suggest he's entitled to give a
10 full and complete answer.

11 THE COURT: I'll let the answer stand.

12 I believe we covered this, so let's move on.

13 BY MS. LEONARDO:

14 Q. When Mr. Stumpel and Lehtinen sent you the money in
15 May or June of 2005, at that time was it a loan or equity?

16 A. Neither of the individuals sent money to me.

17 Q. Well, Mr. Stumpel sent it to you in Ula Makika,
18 correct?

19 A. Mr. Stumpel's money was wire transferred by me into
20 the Ula Makika account and then forwarded on to the seller
21 of Cabo San Lucas.

22 Q. Did you tell Mr. Stumpel at that time it was intended
23 to be a loan or equity?

24 A. It was a loan to Mr. Jowdy, just the same as
25 Mr. Lehtinen also agreed to.

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1 Q. So both those transfers that ended up going to
2 Mr. Jowdy for the purchase of Cabo, were loans; is that
3 right?

4 A. They were original loans to Mr. Jowdy.

5 And when Mr. Jowdy defaulted on the provisions
6 in the agreement he had forwarded to Mr. Lehtinen, that's
7 when I told each of the individuals that I would
8 personally make sure that they were covered in the deal,
9 and that's what I did with Baja Ventures 2006.

10 Q. When did you notify them?

11 A. Within 30 days, when Mr. Jowdy failed to fulfill his
12 obligation.

13 Mr. Jowdy had promised that he was selling one
14 of his real estate ventures in Atlanta, Georgia, called
15 Star Time, which Mr. Jowdy then also borrowed money from
16 our Hawaii loan to try and close his real estate project.

17 When that deal fell through, according to
18 Mr. Jowdy, and he was unable to pay Mr. Stumpel and
19 Mr. Lehtinen the full terms of their agreement, then I
20 covered Mr. Jowdy's position by confirming that I would
21 take care of Mr. Stumpel and Mr. Lehtinen with the Baja
22 Ventures promissory contracts which we all signed.

23 Q. I think you testified on Monday that you don't recall
24 when you had these conversations with Mr. Lehtinen and
25 Mr. Stumpel, did you?

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1 A. I just described about seven conversations. I'm not
2 sure.

3 Q. The question was in or about the period of time, did
4 you have these conversations with them?

5 A. All through the summer of 2005 until the fall of
6 2005.

7 Q. And the promissory note occurred after that or during
8 that time period?

9 A. It occurred when they got back to the United States.

10 Q. That would be in August of 2005?

11 A. That sounds about accurate. It's over a decade ago,
12 but I believe that's about when it would have occurred.

13 Q. And I think you testified on Monday that you don't
14 have any e-mails with regard to these conversations you
15 had with Mr. Lehtinen or Mr. Stumpel?

16 A. E-mails confirming?

17 Q. Do you have any e-mails of conversations with them
18 where you say, in accordance with our conversation, here
19 is a document, here is the promissory note.

20 Do you have any e-mails other than the
21 promissory note? Do you have anything to reflect your
22 conversations?

23 A. With the specific conversations, I had forwarded on
24 to Mr. Lehtinen and his attorney the signed promissory
25 contract I believe in 2011 or 2012, I forwarded along the

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1 affidavit that Mr. Lehtinen signed, which also had
2 reflected ownership interest and agreement to be part of
3 the Diamante Cabo San Lucas project originally as a loan
4 and then subsequently as a debt in equity holder in Baja
5 Ventures in 2006, and there certainly were others with
6 Mr. Stumpel as well.

7 But as I said on Monday, since I was arrested, I
8 have not had access to the majority of my e-mails.

9 Q. So, Mr. Kenner, in addition to Mr. Lehtinen's and
10 Mr. Stumpel's money that ended up going to Propiedades or
11 to the seller, you also transferred loan money from the
12 Centrum loan in the amount of \$1.5 million to Propiedades;
13 isn't that correct?

14 A. I don't recall if the 1.5 was sent to Propiedades or
15 LOR Management in Mexico.

16 Q. Well, the Centrum loan money came into your account
17 Little Isle; isn't that right?

18 A. I don't recall if it came into the Little Isle IV
19 account or into the Big Isle V Ventures account.

20 Q. And then you sent, because you're the only signatory
21 on the Little Isle account; isn't that right?

22 A. I am the only signature on the Little Isle IV
23 account.

24 Q. So you sent \$1.5 million to Mr. Jowdy, whether it was
25 his LOR Management account or the Propiedades account, for

Kenner - Cross/Leonardo

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1 the purchase of Cabo; isn't that correct?

2 A. I sent it to Mr. Jowdy as part and parcel to the 15
3 percent loan agreement we had signed in December 2004.

4 Q. Because you thought that it was a good deal for your
5 Little Isle members?

6 A. Absolutely I believe that to be the case.

7 It was a 3 percent positive cash position for
8 us.

9 Q. Mr. Kenner, in addition to the -- well, you took a \$3
10 million loan from Centrum; isn't that right?

11 A. I believe it was \$3 million.

12 Q. Of that amount, you had to pay fees and costs; isn't
13 that correct?

14 A. I believe there were fees and costs associated with
15 it, yes.

16 Q. So the actual amount that Little Isle ended getting
17 was approximately 2.5 million; isn't that correct?

18 A. Sounds about accurate.

19 Q. And of that amount -- by the way, how much interest
20 did you expect that you were going to earn from
21 Mr. Kenner -- I mean from Mr. Jowdy?

22 A. What was designated on the December 2004 loan
23 agreement, 15 percent.

24 Q. At the time you took the Centrum loan, how much
25 interest did Mr. Jowdy owe you at that time?

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1 A. He owed us 15 percent annual interest on the
2 outstanding funds at that time.

3 Q. As of the time you took the Centrum loan in July
4 2005, what was the outstanding amount?

5 A. I don't recall, as I sit here today, but if you show
6 me some documents, I would be glad to tally them up for
7 you.

8 Q. The Centrum loan was a 12 percent loan; isn't that
9 correct?

10 A. I believe that's correct.

11 Q. That's where you're getting a 3 percent profit for
12 your Little Isle members; isn't that right?

13 A. I would call it a positive cash position.

14 Q. So when you took the Centrum loan, you paid
15 approximately a half million dollars in fees and costs for
16 that loan; isn't that right?

17 A. That is incorrect.

18 Q. Well, the loan the amount that went into the Little
19 Isle IV account was approximately 2.5 million?

20 A. That sounds accurate, if it was in fact the Little
21 Isle IV account. I don't know. I don't recall if it was
22 Little Isle IV.

23 Q. What was the \$500,000 for?

24 A. That was a set aside for future interest payments.

25 So if the loan had been paid back by Mr. Jowdy

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1 within 30 days, and we paid the Centrum loan during that
2 period of time, we would receive the 3 percent arbitrage
3 interest on that.

4 Q. If he had paid you back at the time of the closing?

5 A. We would have made a 3 percent arbitrage interest, a
6 positive benefit for the investors.

7 Q. Well, at that point, you had sent to Mexico about 1.6
8 million; does that sound about right?

9 A. If you show me bank records, I can sit here and
10 calculate them up for you if you would like.

11 Q. If Mr. Jowdy paid you back in 30 days, the
12 approximate interest that you would have gained is about
13 \$4,000, right?

14 A. It would have been 3 percent positive cash flow on
15 the fund.

16 Q. That's about \$4,000?

17 A. I don't have a calculator in front of me.

18 That's how our American banking system works.

19 Q. So you expected Mr. Jowdy to pay back within 30 days,
20 correct?

21 A. According to Mr. Jowdy, he was selling his real
22 estate project in Georgia and was looking for a short term
23 loan at that point, and/or he was also looking to
24 refinance or finance some development money out of
25 Diamante Del Mar that he and William Najam were working on

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1 at the time.

2 Q. And the Centrum loan, and I think this was discussed
3 at trial, the Centrum loan was supposed to be intended
4 solely for the purchase of property in Hawaii; isn't that
5 correct?

6 A. The Centrum loan was to be used by Big Isle V
7 Ventures in concert with the operating agreement that had
8 been forwarded to Centrum during the loan process.

9 Q. The Centrum loan provided it was supposed to be
10 specifically for the benefit of the purchase of the
11 property in Hawaii; isn't that correct?

12 A. That's absolutely incorrect.

13 Q. According to the closing statement for Centrum, the
14 Centrum loan which was in evidence in the criminal trial,
15 3717, the loan fee was approximately \$220,000; does that
16 sound right?

17 A. I don't have the document to refer to as I sit here
18 today. That was approximately 11 years ago.

19 Q. Showing you what's been marked in evidence as exhibit
20 3717, is that a copy of the closing statement for the
21 Centrum loan?

22 A. This is not a closing statement from the original
23 Centrum loan, as far as I can tell.

24 Q. Explain to us what that document is?

25 A. I don't know what it is, but it's titled estimated

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1 closing statement, March 31, 2006.

2 Q. Did you sign that statement?

3 A. Yes, that appears to be my signature.

4 Q. As you sit here today, you don't recall what that
5 document is supposed to be representative of?

6 A. It appears to be representative of an estimated
7 closing statement from March 31 of 2006.

8 This is not the original Centrum loan.

9 Q. Because you couldn't pay off the Centrum loan within
10 the 6 months or so that it was supposed to be paid off in,
11 correct?

12 A. We did not.

13 We sought an extension because we were still
14 waiting on development permitting to come through so we
15 could actually utilize the funds.

16 Raising money for the Hawaii project was very
17 difficult and after working our way through approximately
18 20 hard money lenders, it was a collective decision of
19 myself, John Kaiser and the chief operating officer, Chris
20 Manfredi, to take the Centrum loan because when they came
21 along, they were very hard to find, as we heard through
22 the criminal trial.

23 Q. So let me back up a little bit.

24 You take the Centrum loan on or about July 19 of
25 2005; is that correct?

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1 A. I couldn't understand what you said.

2 Q. You take the Centrum loan on or about July 19, 2005,
3 correct?

4 A. That sounds accurate, July of 2005.

5 Q. Little Isle gets approximately 2.5 million into the
6 account as the proceeds of the loan, correct?

7 A. I haven't seen the Little Isle bank statement, so if
8 you could show it to me.

9 Q. Then you send, and I think you testified to this,
10 approximately 1.5 million goes to Mr. Jowdy in Mexico,
11 whether it's LOR Management or Propiedades, correct?

12 A. I actually testified that exactly \$1.5 million went
13 to Mr. Jowdy, not approximately.

14 Q. Exactly 1.5.

15 You also sent \$650,000 from Ula Makika to CMG,
16 correct?

17 A. Are you saying that I already said that?

18 Q. After you get the proceeds of the Centrum loan, you
19 sent \$650,000 to CMG Management, correct?

20 A. I don't know.

21 If you show me some bank statement, I can verify
22 what was sent to each and every party that we owed money
23 to at that time.

24 Q. By the way, you got the loan on July 19 and you were
25 supposed to close on Waikapuna 11 days later; is that

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1 right?

2 A. I don't recall.

3 If you show me the original Waikapuna purchase
4 and sale contract, I can confirm it for you.

5 Q. Because you didn't close, I believe you testified to
6 this at trial, because you didn't close on Waikapuna when
7 you should have, you had to get extensions from
8 Mr. Chombley; isn't that correct?

9 A. In fact, the reason that we didn't close on Waikapuna
10 is because Lehman Brothers was supposed to close with us
11 at the end of July on the Waikapuna parcel.

12 And due to some egregious 11th hour terms by
13 Lehman Brothers, which was also documented by Mr. Manfredi
14 as being egregious, we decided to walk away from the
15 Waikapuna purchase at that point in time, which was not
16 Waikapuna. It was an entire funding effort for all of the
17 Hawaii projects.

18 So had I taken Lehman Brothers' funding at that
19 point in time, it is 100 percent certainty we would have
20 lost the property to Lehman Brothers within two years
21 based on their egregious terms.

22 Q. You ended up paying penalties because you couldn't
23 close on Waikapuna in the amount of \$500,000; is that
24 correct?

25 A. The penalties were negotiated by me because we felt

Kenner - Cross/Leonardo

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1 it was important to still acquire that, the Waikapuna
2 parcel.

3 Q. So you paid penalties in the amount of approximately
4 \$64,000 per week for eight weeks; is that right?

5 A. No.

6 We paid \$64,400 one week extensions for seven
7 consecutive weeks until I was able to negotiate with
8 Mr. Constantine and his partner at the time to fund the
9 Waikapuna parcel purchased on its own while we still
10 sought vertical and horizontal development.

11 Q. Mr. Kenner, you seem to remember that figure very
12 specifically.

13 Is it because you reviewed records with regard
14 to this transaction or not?

15 A. I have reviewed some records.

16 Q. And \$64,000 for seven weeks is almost a half million
17 dollars; is that right?

18 A. Yes, ma'am, that is correct.

19 Q. I have a calculator if you need it.

20 A. I would appreciate it. I can use it.

21 Q. So 64,000 and how much?

22 A. I don't know where I'm supposed to see where I type
23 the number in. I'm not sure what I'm supposed to see.

24 Q. I think you flip the top.

25 THE COURT: I think we can agree 64,000 times

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1 seven is --

2 MS. BECKMANN: Roughly half a million?

3 THE COURT: 450.

4 MR. HALEY: So stipulated, your Honor.

5 THE WITNESS: Sorry, your Honor. I couldn't
6 figure out how to open the calculator.

7 THE COURT: I don't think we need to spend the
8 time. It's around \$450,000.

9 THE WITNESS: That sound accurate. Thank you,
10 your Honor.

11 A. Yes, it would be approximately \$450,000 in fees.

12 And had we not acquired that parcel subsequently
13 both the individuals that I was negotiating with for
14 Mr. Constantine, Lehman Brothers would not have had any
15 interest in a future development without an ocean front
16 parcel.

17 The parcel we found out was appraised for a
18 little over \$35 million under our \$4.2 million purchase
19 contract that I negotiated for the property.

20 Q. Mr. Kenner, because you didn't close on time, you
21 also incurred an additional \$700,000 as part of the
22 Centrum loan; is that correct?

23 A. Because we didn't close what on time?

24 Q. Because you didn't close in Hawaii, you couldn't pay
25 the Centrum loan back; is that correct?

Kenner - Cross/Leonardo

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1 A. Because we didn't close what in Hawaii?

2 There were a multitude of closings.

3 Q. You tell me.

4 Which deal is supposed to pay the Centrum loan?

5 A. The Centrum loan was supposed to be paid off at the
6 point in time when we were able to get subdivision
7 approval on the Honu'Apo 1500 acre parcel which we had
8 been waiting for 18 months from the Cabu District and
9 Chris Hume at the planning department.

10 And upon closing of that deal, we had 26
11 pre-registered parcels with the county and we expected to
12 be selling those parcels in the neighborhood of a
13 million-and-a-half dollars each.

14 So at that point in time we believed we would
15 not just be able to pay off the loan to Centrum, but we
16 would be able to start early infrastructure and
17 engineering that we had already been paying for for about
18 12 months on the Honu'Apo parcel.

19 Q. So from the Centrum loan, the initial loan amount of
20 2.5 million, none of that amount went to the benefit of
21 the Hawaii property?

22 A. That's incorrect.

23 Q. What portion went to the benefit of the Hawaii
24 property?

25 A. If you show me the bank statements, I can tell you

Kenner - Cross/Leonardo

specifically, but certainly each dollar that was spent was related to project expenses and/or development.

3 Q. Well, the Centrum loan, the two-and-a-half million
4 that you got, you sent 1.5 to Ken Jowdy?

5 A. 15 percent interest rate that Mr. Jowdy reneged on
6 the deal and defaulted.

7 Q. On the 12 percent loan that you had for Centrum, you
8 had a 12 percent loan agreement with Centrum, correct?

9 A. I had a 12 percent.

10 Are you asking me if borrowing money at 12
11 percent and loaning it at 15 percent is a bad business
12 deal for somebody?

13 Q. That's not my question.

14 A. You seem to be insinuating -- I'm just confused
15 because that's how our American banking system works.

16 Q. I'm asking you a question.

In addition to the 12 percent Centrum loan, you were also paying what percentage on the lines of credit?

19 A. The lines of credit were the expenses of the
20 corporation that were outstanding regardless of what we
21 did with Centrum.

22 Q. I don't care if it was for the corporation's
23 expenses, what was the percentage rate you were paying or
24 the corporation was paying on the lines of credit?

25 A. I don't recall, as I sit here today, but if you show

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1 me some bank statements I'll be glad to verify it.

2 Q. Was it 6 percent? 7 percent? Was it lower? Higher?

3 A. I don't know, as I sit here today, but if you show me
4 bank statements since there were variable interest rates
5 on those loans.

6 Q. I think you testified earlier that you just reviewed
7 the Northern Trust records that you had subpoenaed, so was
8 there any information on what the percentage amount was?

9 A. No, not that I recall.

10 Q. The 1.5 million you sent to Ken Jowdy, so that's
11 about a million, correct, rough math, and you sent
12 approximately --

13 A. What is about one million? You just said I sent 1.5
14 million.

15 Q. One million from the Centrum loan; is that correct?

16 THE COURT: She's saying one million left.

17 THE WITNESS: I'm sorry, your Honor.

18 I'm having a hard time hearing her voice.

19 A. If you could start over with that, I'm sorry.

20 Q. You have 2.5 million, minus one-and-a-half million,
21 leaves you a million from the Centrum loan; is that right?

22 A. Yes.

23 Q. And the 650,000 goes to CMG Management; is that
24 right?

25 A. That was part of the consulting payments that were

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1 due to Mr. Constantine I believe.

2 Q. Sure.

3 And then you have about \$350,000 left from the
4 Centrum loan, so where did that money go?

5 A. If you show me bank statements, I'm sure I can verify
6 it for you.

7 Q. And then the actual Centrum loan?

8 A. Can I see the bank statements so I can answer that
9 question for you?

10 Q. And the actual --

11 THE COURT: If she doesn't want to cover it, she
12 can move on, okay?

13 THE WITNESS: All right.

14 BY MS. LEONARDO:

15 Q. The actual loan amount that you ended up paying back
16 to Centrum, you had two-and-a-half million, you paid them
17 back 3.7 million; is that right?

18 A. It was covered in the closing costs by Lehman
19 Brothers.

20 Q. So my question was, the actual loan amount that gets
21 paid back to Centrum is 3.7 million; is that correct?

22 A. I believe it was in that neighborhood, yes.

23 We had negotiated in the end with Centrum for a
24 reduction of some sort, but I believe it was somewhere in
25 that neighborhood.

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1 Q. The document I just showed you, Government's Exhibit
2 3717, indicates a closing statement of 3.7 million that
3 goes to Centrum; is that right?

4 A. The statement, if you can show it to me again, I can
5 verify what's on that, but I believe that the number was
6 adjusted at the Lehman Brothers closing on August 26,
7 2006, negotiated between Lehman Brothers and Centrum just
8 like they negotiated independently with Urban Expansion.

9 Q. I show you exhibit 3717. It's entitled closing
10 statement, right?

11 A. It's entitled estimated closing statement March 31st,
12 2006.

13 Q. The amount that was due to go to Centrum was \$3.7
14 million, correct?

15 A. That's what it says on the closing statement.

16 Q. You get two-and-a-half million in proceeds and you
17 had to pay them back 3.7 million; is that right?

18 A. 3.7 million was paid back minus whatever negotiated
19 reduction there was by Lehman Brothers approximately six
20 months after this date.

21 Q. My question was much simpler.

22 On a \$2.5 million proceeds, you had to pay back
23 3.7 million; is that right?

24 A. I'll take your word for it.

25 Q. You don't have to take my word for it. It's on that

Kenner - Cross/Leonardo

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1 document.

2 A. No, it's not on this document.

3 This is an estimated closing statement from the
4 extension on March 31st, 2006, after Lehman Brothers had
5 begun to get involved with financing the entire Hawaii
6 development.

7 Q. Are you familiar with the Lehman closing documents?

8 A. I have seen them.

9 It's approximately 1800 pages of it.

10 Q. By the time -- there's a document in front of you
11 dated March 2006.

12 By the time Lehman Brothers closed in Hawaii,
13 the amount due to Centrum was actually more like 3.9
14 million; isn't that right?

15 A. It's entirely possible it may have been.

16 The five month closing period with Lehman
17 Brothers was not any fault of mine or my investors.

18 It was Lehman Brothers extending the period of
19 time and they covered that as part of the proceeds of the
20 joint venture, so it doesn't cost my client anything.

21 Q. I think this was covered during the criminal trial.

22 But your clients, after the Lehman closing, they
23 didn't get their lines of credit completely paid off, did
24 they?

25 A. They weren't entitled to, according to the Lehman

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1 closing.

2 It was a separate and independent and unique
3 situation what was paid back to my clients and I as part
4 of our Hawaii partnership, separate and independent from
5 what was negotiated between Urban Expansion directly with
6 Lehman Brothers, and separate from what was negotiated
7 between Centrum and Lehman Brothers, in addition to other
8 parcels that were being acquired during the joint venture
9 that were independently negotiated between Alan Worden,
10 Lehman Brothers and those other third-parties.

11 Q. By the way, Mr. Kenner, you testified on Monday that
12 your interest in Baja Ventures capital contribution was
13 2.5 million; is that correct?

14 A. That's what it says on Diamante Cabo San Lucas.

15 Q. That number is not correct; is that what you're
16 saying?

17 A. I'm saying the number that came from Lehtinen and
18 Stumpel was 2.456 million.

19 Q. Where did the other 44,000 come from?

20 A. Bill Najam and Ken Jowdy and Larry Markowitz filed
21 the final documents. I didn't file those documents.

22 Q. Did you raise any objection with Mr. Najam, Mr. Jowdy
23 and Mr. Markowitz that, hey, your actual contribution is
24 only 2.46 million?

25 A. Yes, we did, about six months later when they

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1 forwarded the full package to myself and the rest of the
2 investors.

3 Q. You're saying you were not aware of that prior to
4 getting those closing documents six months later?

5 A. No, I had not seen the full operating agreement at
6 that time.

7 All I saw was the signature page that
8 Mr. Markowitz or Mr. Najam had forwarded to me.

9 MS. LEONARDO: Your Honor, I'm just going to
10 show the witness what's in evidence as forfeiture exhibit
11 81.

12 BY MS. LEONARDO:

13 Q. Mr. Kenner, looking at that exhibit, is that an
14 e-mail to you?

15 THE COURT: Mr. Haley, do you have to be in
16 Judge Wexler at 11 or no?

17 MR. HALEY: I do, your Honor. Sometimes, with
18 all due respect to Judge Wexler, it's not necessarily at
19 11. Yes, it is scheduled for 11, your Honor. Correct.

20 THE COURT: Do you want me to have my clerk call
21 down to see if they're ready for you?

22 MR. HALEY: I think, rather than interrupt this
23 proceeding, I'll go whenever I'm required. But, yes,
24 thank you.

25 THE COURT: What's the question?

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1 BY MS. LEONARDO:

2 Q. The question was, Mr. Kenner, was this an e-mail that
3 was sent to you or cc'd to you?

4 A. It appears it was cc'd to me.

5 Q. In the beginning of the e-mail, it's from Mr. Najam;
6 is that correct?

7 A. I believe it's from Mr. Najam.

8 Q. Mr. Jowdy and you're cc'd, correct?

9 A. Yes.

10 Q. Within that e-mail, Mr. Najam is indicating, to you
11 and Mr. Jowdy, can you and Phil breakout what is owed out
12 of the 6,625,000; do you see that?

13 A. I do.

14 Q. So I thought -- you testified earlier -- there was a
15 total of seven million that was put into Cabo?

16 A. I testified that's what I was aware was put into Cabo
17 San Lucas as of the Diamante Cabo San Lucas operating
18 agreements, that's correct.

19 Q. When you saw this e-mail where it reflects
20 \$6,625,000, did you have any conversations with Mr. Jowdy
21 or Mr. Najam or Mr. Markowitz as to where the additional
22 375 was?

23 A. No, because I didn't see those numbers until about
24 six months after this e-mail, so it would have been hard
25 to have that conversation when I received this e-mail.

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1 Q. And as of February 14, 2006, Mr. Najam, in essence,
2 was telling you all the funds were to be equity?

3 A. That's correct, on or about February 5th or 6th,
4 2006, Mr. Jowdy, for the first time, told Mr. Najam that
5 he had been borrowing the money from myself, my investors,
6 and a Hawaii entity, and Mr. Najam had forwarded an e-mail
7 at that time I believe on February 6th of 2006 instructing
8 Mr. Jowdy that all of the loans needed to be deemed
9 investments for the purpose of the closing, and I believe
10 probably eight days later he was just reiterating to
11 Mr. Jowdy that all the funds would have to be equity.

12 Q. Well, at the time of the e-mail, had you already
13 signed the promissory note with Mr. Lehtinen and
14 Mr. Stumpel?

15 A. Absolutely.

16 I believe that the funds from Mr. Stumpel and
17 Mr. Lehtinen were a subset of whatever number that
18 Mr. Jowdy and Mr. Najam and/or Mr. Garcia, the Mexican
19 attorney, had forwarded on to the seller in totality,
20 which I never saw any of those transactions.

21 Q. And at this point you also knew that CSL Properties
22 had put in \$2 million; is that correct?

23 A. I believe that was about what I thought they put in,
24 correct.

25 Q. Are you saying you were not aware that Mr. Jowdy's

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1 contribution, at that point, was \$2.5 million?

2 A. Mr. Jowdy never made a contribution. He borrowed
3 money from myself, my investors and my friends, and then
4 listed it as his capital contribution.

5 Q. Right, a loan from your friends and your investors
6 from your Hawaii development properties; isn't that right?

7 A. I don't know where he got all of his money from, but
8 I know he borrowed a significant amount from us in Hawaii.

9 He also borrowed \$1.6 million from Joseph
10 Stumpel directly into Mexico.

11 He stole \$500,000 from Mr. Murray's Nevada
12 proceeds as was represented in the 2010 case that
13 Mr. Murray won against Mr. Jowdy for those funds.

14 He borrowed probably close to a half million
15 dollars personally from me that was still on his books to
16 be repaid, so I don't know where his \$2.5 million actually
17 came from.

18 Q. Mr. Kenner, you previously testified that Mr. Jowdy's
19 loan came out of the Hawaii investor money. You testified
20 to that at the SEC; do you recall that?

21 A. There were a lot of loans that were given to
22 Mr. Jowdy, one of which was from the Hawaii investment
23 group.

24 Q. You don't recall testifying that all five million to
25 Mr. Jowdy came out of the Hawaii investor group?

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1 A. I believe I testified that there was five million
2 that came from the Hawaii investor group, but that wasn't
3 the entire universe of funds that were loaned to
4 Mr. Jowdy.

5 There was also \$1.6 million to Mr. Stumpel,
6 which he had subsequently had to sue Mr. Jowdy for in
7 Mexico.

8 There was another 400,000 from Mr. Norstrom into
9 Mexico, in which he sued Mr. Jowdy for, a 2004
10 half-million dollar loan to Mr. Jowdy that he actually
11 wrote a \$500,000 bad check to Mr. Norstrom, which is in
12 the government's possession. I saw it in Rule 16.

13 There was about \$400,000 outstanding still to me
14 that I sued him for in the 2008 case with Little Isle and
15 Ula Makika for the unpaid Hawaiian loans.

16 There was a \$125,000 personal loan that Mr. Bach
17 (phn.) Gave to Ken Jowdy in 2005, unknown to all the rest
18 of us, and Mr. Gaudet eventually sued Mr. Jowdy in Mexico
19 for, and I know there's a few I'm leaving out.

20 Q. Mr. Kenner, we talked about your Little Isle lawsuit
21 against Mr. Jowdy on Monday.

22 Also, as a result of that lawsuit, the Judge
23 ordered you to pay Mr. Jowdy's legal fees in the amount of
24 over \$200,000; is that correct?

25 A. Approximately \$220,000 that Mr. Jowdy withdrew from

Kenner - Cross/Leonardo

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1 the Cabo San Lucas project to pay his legal fees in
2 Arizona against us.

3 Q. My question was the Federal District Court Judge in
4 Arizona ordered you to pay the attorney's fees in the
5 amount of over \$220,000?

6 A. He ordered me as one of the plaintiffs, he ordered
7 Ula Makika as one of the plaintiffs, and he ordered Little
8 Isle IV as one of the plaintiffs.

9 Q. That judgment from the Federal District Court in
10 Arizona was not appealed; isn't that correct?

11 A. I don't recall if it was appealed or not.

12 Q. As you sit here today, you still owe those legal
13 fees; isn't that correct?

14 A. Yes, those legal fees are still outstanding.

15 THE COURT: Judge Wexler said 11:30, Mr. Haley.

16 MR. HALEY: Thank you, your Honor.

17 BY MS. LEONARDO:

18 Q. Mr. Kenner --

19 A. As soon as Mr. Jowdy pays back the loan to Little
20 Isle IV and the Hawaii partners, I would be glad to pay
21 his legal fees so he can return the funds he stole from
22 our Cabo San Lucas project to pay off his legal fees.

23 MS. LEONARDO: I move to strike so we can finish
24 today.

25 MR. HALEY: These questions are being asked by

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1 the government and they don't like the answers.

2 As a matter of fact, Judge, I believe the
3 questions will preclude the necessity to revisit trial
4 testimony that was given weeks ago over three-and-a-half
5 day period.

6 THE COURT: Mr. Kenner, try to focus on the
7 question. I do think we are going over a lot. We went
8 through the Centrum loan at the trial. And even though it
9 was a year ago, it's all coming back to me. I don't think
10 we covered any new ground this morning either from his
11 testimony. You repeated a lot of the testimony from
12 Monday and he repeated the trial testimony, so I'm hoping
13 we can wrap up soon, okay?

14 MS. LEONARDO: Yes, your Honor.

15 BY MS. LEONARDO:

16 Q. Now, Mr. Kenner, you also transferred from Owen
17 Nolan's line of credit \$350,000 to the seller of Cabo;
18 isn't that correct?

19 A. That's actually factually incorrect.

20 I believe, after reviewing records, that part
21 and parcel to the Hawaii loan, there was a withdrawal on
22 Mr. Nolan's line of credit as part of his equity
23 contribution to the Hawaii land development project.

24 The funds were transferred as authorized to the
25 Little Isle IV bank account, and then from there those

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1 funds were -- or a portion of those funds may have been
2 used to further the loan to Mr. Jowdy at that time.

3 Q. Mr. Nolan didn't get any promissory note for that
4 loan to Mr. Jowdy or additional equity in Cabo for that
5 \$350,000, did he?

6 A. I don't understand why he would receive equity in
7 Cabo.

8 His contribution that was sitting in the line of
9 credit to be used by Little Isle IV was part of the 12
10 percent interest, equity interest, that he received in
11 Little Isle for his \$2.2 million contribution.

12 Q. Of which you owe him; isn't that correct?

13 A. Pardon me?

14 Q. Of which you personally owe him that amount, 2.2
15 million?

16 A. I was ordered, after the arbitration, to pay him as a
17 result of him lying that he was unaware that he had a \$2.2
18 million loan, despite the fact there's over 40 signatures
19 in the Northern Trust subpoena box that show Mr. Nolan
20 signed it, in addition to text messages that I recently
21 recovered that show that when Mr. Nolan asked for the
22 paperwork, which was in December 2007, I clearly outlined
23 the fact that he was signing the line of credit renewals
24 that he had physically in his possession, and we went
25 through a five day ordeal before Mr. Nolan signed the

Kenner - Cross/Leonardo

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1 actual documents, and he used my FedEx account to send the
2 documents to Northern Trust bank.

3 So he was clearly aware, despite his testimony
4 in the '09 arbitration and subsequently his 2015 testimony
5 here where he said he had no recollection whatsoever of
6 the \$2.2 million line of credit.

7 Q. Apparently the arbitration panel decided differently;
8 isn't that correct?

9 A. They decide differently because there was no
10 documents provided at the trial from the 40 signatures
11 Mr. Nolan had signed over a five year period of time, in
12 addition to the approximate 10 signatures he signed on
13 behalf of Little Isle IV.

14 Q. These were your documents that you did not produce to
15 the arbitration panel; is that right?

16 A. It was never alleged as part of the complaint that
17 there was anything untoward with respect to his line of
18 credit. That became a separate issue that was raised
19 during the arbitration.

20 Q. Mr. Kenner --

21 THE COURT: Are you saying you recently
22 recovered documents? Are you saying since the trial you
23 recently recovered documents?

24 THE WITNESS: The term recently may have been
25 misspoken. I apologize, your Honor.

Kenner - Cross/Leonardo

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1 Out of my 89,000 text messages, I went back to
2 corroborate some of what I believe were factual
3 inaccuracies by some of the witnesses and based on some of
4 the documents that were delivered to Mr. Haley in
5 preparation for the forfeiture hearing, and I saw they
6 were going to introduce Mr. Nolan's testimony that he was
7 unaware of a line of credit, that he never signed a line
8 of credit, nor had he ever given me authorization to open
9 up a line of credit.

10 So I went back into our text message traffic
11 from December 2007 where he and I had about a five day
12 interaction over text messaging, and I found a text
13 message that I had sent to him in response to his question
14 what are the papers for, and I clearly laid it out and I
15 can provide that to the Court as well.

16 So Mr. Nolan was clearly aware, in '07 in
17 addition to '06, '05, '04 and '03 when he signed documents
18 sent directly to him.

19 And all of those documents, your Honor, were
20 delivered to us as part of the Northern Trust subpoena
21 box.

22 THE COURT: If you have uncovered any documents
23 since the trial that you believe suggest that there is
24 something inaccurate about the testimony in the trial,
25 Mr. Haley should definitely submit them to me.

Kenner - Cross/Leonardo

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1 THE WITNESS: Yes, sir. We will do so.

2 Thank you, your Honor.

3 BY MS. LEONARDO:

4 Q. Mr. Kenner, I think you testified on Monday that you
5 found out on February 19, 2006, that your interest in Cabo
6 had to be in Baja Ventures 2006 or a different entity; is
7 that correct?

8 A. No, that's not specifically what I testified to.

9 Q. What did you testify to that you found out your
10 interest had to be in a different LLC?

11 A. After Mr. Jowdy and I spoke on February 19, 2006, and
12 he had sent me an e-mail correspondence with respect to
13 the equity split that Lehman Brothers had allegedly told
14 him had to occur in order for the closing to happen,
15 Mr. Jowdy told me later that day, or on February 20th,
16 that he was not going to be able to pay back Mr. Stumpel
17 and Mr. Lehtinen at the time of the closing which still,
18 on February 20th, I was under the understanding was still
19 a February 27th closing a week later.

20 So at that point is when I began to speak to
21 Mr. Markowitz and I think Mr. Najam may have in fact sent
22 me an e-mail after a conversation he had with Mr. Jowdy
23 suggesting that now there is going to be a new -- he
24 needed a new entity to put it in because I told Mr. Jowdy
25 I was going to have to take care of the guarantee for both

Kenner - Cross/Leonardo

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1 Stumpel and Lehtinen.

2 Q. As of February 20th, you were asking Mr. Najam to put
3 your interest in GuideDog; isn't that correct?

4 A. I don't know, so if you have an e-mail you can show
5 me.

6 I know there were a significant amount of
7 transactions between February 19th and February 23rd when
8 I had confirmed to Mr. Markowitz to create Baja Ventures
9 2006 after Mr. Najam and I had exchanged e-mails.

10 Q. Mr. Kenner, wasn't it more accurate that Mr. Najam
11 told you not to use GuideDog so you wouldn't have to show
12 it on all of the tax return records; isn't that right.

13 A. That is incorrect.

14 MS. LEONARDO: Your Honor, I'm going to show the
15 witness what's in evidence as Forfeiture Exhibit 82.

16 BY MS. LEONARDO:

17 Q. That's dated February 20, 2006, correct?

18 Was that a yes or no?

19 A. I didn't know there was a question pending.

20 Q. The question was that's dated February 20th, 2006; is
21 that correct?

22 A. This is dated February 20th, 2006.

23 Q. In that e-mail you're still requesting that your
24 interest be put into GuideDog; is that correct?

25 A. No, that's incorrect.

Kenner - Cross/Leonardo

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1 Q. Can you read that to us, what does it say?

2 A. Bill -- I'm referring to William Najam -- the 8
3 percent entity is CSL Properties 2006, LLC.

4 It is a Delaware Corp., formed in 2006. The EIN
5 is 20-4314863.

6 I am the managing member and the address of
7 record for the Corp., is:

8 10705 East Cactus Road, Scottsdale, Arizona,
9 89359.

10 More info to follow. PK.

11 And PK is me.

12 Q. I show you what's marked as Forfeiture Exhibit 83.

13 In this e-mail dated February 20, 2006, you're
14 still requesting your interest be put into GuideDog; is
15 that correct?

16 A. That appears to be accurate.

17 Like I said, somewhere between February 19 when
18 Mr. Jowdy told me about the new equity allocation, in and
19 around the 20th, that is when Mr. Jowdy told me he wasn't
20 going to be paying back Mr. Stumpel and Mr. Lehtinen, so
21 by the 23rd we had exchanged a series of e-mails, which I
22 hope you have, that confirmed that Mr. Markowitz was going
23 to open up Baja Ventures 2006.

24 In fact, I saw Mr. Markowitz' billing statement
25 in Rule 16 that confirmed his work on February 23rd.

Kenner - Cross/Leonardo

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1 MS. LEONARDO: Your Honor, I'm going to show the
2 witness what I have marked as Forfeiture exhibits 87 and
3 88.

4 BY MS. LEONARDO:

5 Q. Mr. Kenner, look at exhibits 87 and 88.

6 Do you recognize those as e-mails you sent and
7 received?

8 A. Yes.

9 Q. Exhibit 87 has to deal with CSL Properties; is that
10 correct?

11 A. Yes.

12 I believe this was the temporary operating
13 agreement for CSL Properties I believe because they were
14 still shooting for a February 27th closing date, but each
15 of the CSL members subsequently signed a new operating
16 agreement prepared by Mr. Markowitz prior to the extension
17 to March 26th.

18 MS. LEONARDO: Your Honor, I offer into evidence
19 exhibits 87 and 88.

20 MR. HALEY: Your Honor, my client authenticated
21 the exhibits. We, of course, have no objection.

22 MR. CONWAY: No objection, your Honor.

23 THE COURT: 87 and 88 are admitted.

24 (Government Forfeiture Exhibits 87 and 88 in
25 evidence.)

Kenner - Cross/Leonardo

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1 BY MS. LEONARDO:

2 Q. Looking at the percentage of ownership in CSL
3 Properties, have those percentages changed since on or
4 about February 23rd, 2006?

5 A. I don't know.

6 Q. Well, you were the managing member of CSL Properties;
7 is that correct?

8 A. Yes, I was.

9 Q. From the time you were the managing member, until the
10 time you were no longer the managing member, have those
11 percentages ever changed?

12 A. I don't recall.

13 Q. It would have to come from you as the managing
14 member?

15 A. Yes, it would have.

16 Q. As you sit here today, you don't recall if these ever
17 changed?

18 A. I don't recall if they changed or not.

19 Q. Looking at exhibit 88, the bottom portion of the
20 e-mail is from Bill Najam to you; is that correct?

21 A. Yes, it is.

22 Q. It says:

23 Phil, we are not going to use GuideDog, if it's
24 okay with you.

25 I'm going to have Larry create two new LLCs for

Kenner - Cross/Leonardo

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1 your interest and Ken's interest. That way, we don't have
2 to worry about tax returns or questions. You'll control
3 your LLC and CSL, and Kenner will control his in Diamante
4 Properties LLC.

5 If you have any questions, please call me, Bill.

6 Do you see that?

7 A. Yes.

8 Q. There was a question about your tax return for
9 GuideDog; isn't that correct?

10 A. That was incorrect.

11 This e-mail was as a result of Mr. Jowdy telling
12 Mr. Najam that I was going to need a new LLC to be set up.

13 And that's when I instructed him in response to
14 go ahead and create Baja Ventures 2006.

15 So Mr. Jowdy and I had several conversations
16 about him not paying Mr. Stumpel and Mr. Lehtinen back.

17 That's when I told Mr. Jowdy that he was -- I
18 was going to have to set up a new LLC to cover the
19 promissory contract with the two of them.

20 Q. That doesn't say that anywhere in this e-mail?

21 A. It doesn't need to.

22 Q. All it says in this e-mail is that that way we don't
23 have to worry about tax returns or questions.

24 That's what it says in the e-mail; isn't that
25 correct?

Kenner - Cross/Leonardo

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1 A. It does, but I wasn't scripting Mr. Najam. Those
2 were Mr. Najam's words.

3 Q. Mr. Kenner, you responded and said, go ahead and
4 create Baja Ventures.

5 You didn't take any issue with Mr. Najam about
6 tax returns in your response, did you?

7 A. There was no relevancy.

8 I didn't tell him what I was or wasn't eating or
9 where I was traveling to. It had no relevancy to setting
10 up Baja Ventures 2006 operating agreement.

11 I didn't represent to him that it was as a
12 result of Mr. Jowdy not paying back Mr. Stumpel and
13 Mr. Lehtinen.

14 I didn't represent that he still owed close to
15 \$7 million to the Hawaii investors.

16 I wish I had.

17 Q. Mr. Kenner, wouldn't that have been relevant for
18 Mr. Najam to know and/or for you to respond; hey, I don't
19 have any tax returns for GuideDog.

20 There's no response to that, isn't that correct?

21 A. Absolutely unnecessary, because we were setting up
22 the new LLC because I had to cover Mr. Stumpel and
23 Mr. Lehtinen.

24 Why would I explain anything that wasn't
25 relevant?

Kenner - Cross/Leonardo

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1 Q. You didn't explain to him in this e-mail anything
2 about Mr. Lehtinen and Mr. Stumpel with regard to setting
3 up the new Baja Ventures, did you?

4 A. Why would I need to?

5 Q. Why wouldn't you?

6 A. Because it was irrelevant to the actions of the
7 e-mail.

8 This e-mail was to indicate that he had
9 obviously spoken with Mr. Jowdy and knew that a new LLC
10 had to be set up, so he was confirming that with me, that
11 we're not going to use GuideDog, if that's okay with you,
12 that we're going to set up a new one.

13 So my immediate response was go ahead, create
14 Baja Ventures 2006.

15 Q. You have no e-mails, you have no memorialization with
16 regard to you telling Mr. Najam that there were problems
17 with Stumpel and Lehtinen and Jowdy, and why you were
18 setting up Baja Ventures; isn't that correct?

19 A. Mr. Najam was fully aware that Mr. Jowdy had owed a
20 lot of money.

21 We already reviewed at least two documents that
22 I think I've seen in the last few days that refer to
23 Mr. Najam knowing that none of the loans can be made as
24 investments.

25 Q. My question is, you do not have a follow-up to

Kenner - Cross/Leonardo

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1 Mr. Najam's e-mail saying we don't have to worry about tax
2 returns, let's set up a new LLC.

3 You had no response to the tax return portion of
4 that?

5 A. I don't see, as I sit here today, why I would have
6 responded to that. It would have seemed foolish.

7 Q. You testified on Monday that CSL Properties was
8 originally supposed to have 40 percent?

9 A. That is correct.

10 Q. There was nothing in writing that reflects that,
11 right? That CSL is supposed to have 40 percent?

12 A. I believe I saw one e-mail during Rule 16 where
13 Mr. Jowdy refers to a different equity percentage for CSL
14 Properties, but I did not see any that reflected the 40
15 percent equity.

16 What I did see and review was a February 19th
17 e-mail where Mr. Jowdy had told me, after a phone call
18 that he allegedly had with Mr. Bahti at Lehman Brothers,
19 that the equity percentages had to change so Mr. Jowdy
20 would have a controlling interest in the property because
21 Mr. Jowdy persuaded me that there was a problem with me
22 and Lehman Brothers because I walked away from their loan
23 in the summer of '05.

24 Q. So you're saying the percentages changed so Mr. Jowdy
25 could have a controlling interest; is that what you just

Kenner - Cross/Leonardo

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1 said?

2 A. That's what Mr. Jowdy told me was required by Mr.
3 Bahti at Lehman Brothers, and he memorialized it in an
4 e-mail and he was going to change it for now and
5 indicating as he did on the phone, that it would be
6 changed, it would reflect the proper equity at a future
7 date.

8 Q. My question was much simpler.

9 Did you just testify that the percentages were
10 changed so Jowdy would have a controlling interest in the
11 Cabo project; is that what you just testified to?

12 A. I believe I testified that Mr. Jowdy had sent me an
13 e-mail to confirm and memorialize a phone call he had with
14 me, that Lehman Brothers required him to have a management
15 controlling interest in the project and us the equity
16 position would have to be as follows.

17 And Mr. Jowdy laid that out in his e-mail on
18 February 19, 2006.

19 Q. And that's why CSL Properties went from having 40
20 percent to having 8 percent?

21 A. According to Mr. Jowdy's representation on the
22 February 9th e-mail, that's correct.

23 Q. Prior to CSL Properties going down from 40 percent to
24 8 percent, there would have been some -- prior to CSL
25 Properties interest going from 40 percent to 8 percent,

Kenner - Cross/Leonardo

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1 there would have been at least several members of CSL that
2 had more than a 5 percent interest in the entire Cabo
3 project; is that correct?

4 A. That's incorrect.

5 Q. If two of the players had a 12-and-a-half percent
6 interest, that would give them more than a 5 percent
7 interest in the entire project; isn't that right?

8 A. I don't believe so. I believe that would be a 5
9 percent interest.

10 Q. So they would have a 5 percent interest?

11 A. Yes.

12 You asked me if they would have more than 5
13 percent interest.

14 Q. I think you said anyone who has a 5 percent interest,
15 that Lehman didn't want anyone having more than a 5
16 percent interest not being a citizen, isn't that correct?

17 A. I believe that's exactly what I said.

18 Q. Were there any e-mails or documents addressing the
19 issue of whether or not any of the CSL Property members
20 would have more than a 5 percent interest or had a 5
21 percent interest?

22 A. It was a greater than 5 percent interest that Lehman
23 Brothers had told us, and I believe that's on a follow-up
24 e-mail that I had seen for the first time in discovery
25 that the government turned over for Mr. Jowdy's attorney

Kenner - Cross/Leonardo

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1 that confirmed to me that Mr. Jowdy's story about the
2 change in equity was from Lehman Brothers. It confirms
3 Mr. Jowdy made up that story and that they only wanted to
4 review people with more than a 5 percent equity interest.

5 Q. So you're saying the person had to have more than 5.1
6 percent interest in Cabo before Lehman Brothers was
7 interested in them?

8 A. According to the e-mail that I reviewed during
9 discovery, which was from Mr. Bahti I believe to Mr. Najam
10 and Mr. Jowdy, I was never cc'd on, so I never knew
11 anything about this, but it was consistent with what I was
12 told, and that was anyone with more than 5 percent
13 interest at Lehman Brothers was going to have to do a
14 background check because they were investing money for the
15 first time in Mexico and they were concerned about Patriot
16 Act issues with foreign investors having a significant
17 portion which they considered over 5 percent.

18 Q. CSL Properties still has a 40 percent interest.
19 Demetri Khrstich would have had a 5 percent interest,
20 correct?

21 MR. HALEY: Judge, I object.

22 For the benefit of the stenographer, I think the
23 witness needs to finish his answer.

24 THE COURT: He hadn't finished his answer.

25 Mr. Kenner, what were you saying?

Kenner - Cross/Leonardo

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1 THE WITNESS: Yes, sir.

2 I was just following up to suggest that both
3 Mr. Khristick and Mr. Tsyplakov, who had 12 percent
4 interest in CSL Properties, would have had a 5 percent
5 stake in the overall project, and Lehman Brothers was
6 concerned about anyone with greater than 5 percent
7 according to the e-mails I reviewed that were turned over
8 by Mr. Harvey during the pretrial Rule 16 production.

9 BY MS. LEONARDO:

10 Q. Mr. Kenner, I think you testified on Monday that the
11 reason you were now the 100 percent owner of Baja Ventures
12 was because Mr. Stumpel and Lehtinen had a 5 percent
13 interest and they couldn't have a 5 percent interest in
14 Cabo; isn't that correct?

15 A. They would not have had a 5 percent interest in Cabo.

16 Q. Your 5 percent in Baja Ventures, didn't you testify
17 on Monday that the reason you took 100 percent of Baja
18 Ventures as your equity, was because Lehtinen and Stumpel
19 cannot be shown as being an owner because they were
20 foreigners.

21 Didn't you testify to that?

22 A. I don't recall that testimony. If you read it back
23 to me I can confirm it.

24 Q. Mr. Kenner, in your testimony on Monday at page --

25 MR. HALEY: Judge, perhaps, may I look over

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1 counsel's shoulder? I don't have the transcript.

2 Your Honor, it is 11:30. This might be an
3 opportune time to break.

4 THE COURT: Yes, let's break.

5 (Recess taken.)

6 (After recess.)

7 THE CLERK: All rise.

8 THE COURT: Please be seated.

9 Go ahead, Ms. Leonardo.

10 MS. LEONARDO: Thank you, your Honor.

11 BY MS. LEONARDO:

12 Q. Mr. Kenner, I think when we broke my question to you
13 was whether or not you had testified on Monday that anyone
14 with a 5 percent interest or greater, Lehman didn't want
15 to show as equity because they have to do a background
16 check if they're foreigners.

17 That's what you testified to?

18 A. I believe anyone -- I was told anyone that had a
19 greater than a 5 percent interest, not 5 percent and
20 greater.

21 Q. Well, on Monday, you testified to this at page 119:

22 They, Lehman Brothers, were concerned, and I see
23 the e-mails in evidence, that anyone that had a 5 percent
24 interest or larger in the project that Lehman wanted, was
25 going to have to do a background check and they didn't

Kenner - Cross/Leonardo

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1 want foreigners to have that equity position at the
2 closing.

3 Do you remember testifying to that on Monday?

4 A. That sounds familiar.

5 And as a result of Mr. Jowdy's equity change on
6 February 19, only he and I had greater than 5 percent
7 interest, five or greater.

8 Q. So, prior to the change in CSL Properties' interest
9 though, at least those two individuals that had a 12.5
10 percent interest would have had a greater than 5 percent
11 interest in the Cabo project; isn't that correct?

12 A. That is incorrect.

13 Q. You're saying they wouldn't have had a 5 percent
14 interest?

15 A. I would agree with that.

16 What you previously said was they would have
17 greater than 5 percent, which is incorrect.

18 Q. But your testimony is, and was earlier, that the
19 reason you put Stumpel and Lehtinen's interest into your
20 interest as 100 percent, is because they had a 5 percent
21 interest and they could not have had that per Lehman's
22 instructions; isn't that correct?

23 A. That makes absolutely no sense, what you just said.

24 (Continued on next page.)

25

Kenner - Cross/Leonardo

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1 BY MS. LEONARDO:

2 Q. Well, you testified earlier that Mr. Stumpel and
3 Mr. Lehtinen each had a five-percent interest in Baha
4 Ventures; isn't that correct?

5 A. That is correct. That's still correct today.

6 Q. And you testified earlier that because they had a
7 five-percent interest, they could not be reflected in the
8 Lehman paperwork because they were foreigners and Lehman
9 did not want background checks of them, right?

10 A. They wouldn't have had the five-percent interest in
11 the 35, 39 percent or 40 percent equity position. They
12 would not have a five-percent or a greater position in
13 that type project.

14 Q. So why don't you take them off the agreement -- they
15 would be no reason to take them off the agreement with
16 that five percent; isn't that correct?

17 A. Take them off what agreement?

18 Q. There would be no reason for you to take 100 percent
19 of Baha Ventures if Lehtinen and Stumpel were not going to
20 have five percent or more in the project; isn't that
21 correct?

22 A. Either Mr. Stumpel or Mr. Lehtinen in all the years
23 since 2005 when they signed those agreements, or the 2006
24 Diamonte Cabo San Lucas had ever raised a single issue
25 with me.

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1 Q. Mr. Kenner, the question to you was way, way simpler
2 than that.

3 The question to you was: There's no reason for
4 you to have 100-percent in Baja Ventures in 2006, if what
5 you just testified to is true, that Lehtinen and Stumpel
6 did not have more than a five-percent interest?

7 A. Again, I didn't follow what you're saying.

8 MR. HALEY: Objection.

9 THE COURT: She wants to know why you had --
10 what was the reason that you had to have 100-percent
11 interest in Baja Ventures, and you didn't give them an
12 interest in Baja Ventures. That's what she wants to know.

13 THE WITNESS: They did have an interest in Baja
14 Ventures through the office of contract securities granted
15 a five-percent equity stake in a preferred debt position
16 on there. The funds that they contributed.

17 THE COURT: Baja Ventures?

18 THE WITNESS: Yes, sir, they did.

19 Q. Mr. Kenner, on the closing statement you are
20 100-percent owner of Baja Ventures on the closing
21 statement of Lehman; isn't that correct?

22 A. Yes, that is correct.

23 Q. Stumpel and Lehtinen's names do not appear on that,
24 do they?

25 A. No, they do not. But they were captioned plaintiffs

Kenner - Cross/Leonardo

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1 in the 2009 lawsuit filed against Mr. Jowdy, so they were
2 clearly aware that they were owners.

3 Q. My question is very simple. Mr. Stumpel and
4 Mr. Lehtinen do not appear on the Lehman closing documents
5 as having an interest in Baha Ventures; isn't that
6 correct?

7 A. That is absolutely correct.

8 Q. Mr. Kenner, you represented on one of your financial
9 statements that you are a 50-percent owner of Kau
10 Holdings, K-A-U, Holdings.

11 How did you acquire interest in that?

12 A. I don't recall.

13 Q. Is Kau Holdings one that was completely funded by
14 Mr. Kaiser?

15 A. No, that's incorrect.

16 Q. Who else contributed funds to Kau Holdings?

17 A. I don't recall the structure of Kau Holdings, as I
18 sit here today, nor do I recall what the original purpose
19 of Kau Holdings were.

20 Q. Nonetheless, you represented on one of your financial
21 statements that you were a 50-percent owner of Kau
22 Holdings for about \$16 million equity; is that right?

23 A. If you show me a financial statement, I'll be glad to
24 verify that I did.

25 Q. I'll show you what's already in evidence as

Kenner - Cross/Leonardo

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1 Exhibit 85. On the second page of that document, you
2 indicate that you are a 50-percent owner of Kau Holdings.

3 (Handing.)

4 A. I see that on the second page, yes.

5 Q. Okay. How did you get an interest in Kau Holdings?

6 A. I don't recall, as I sit here today, but it was my
7 project.

8 Q. Well, it's a \$16 million investment, and -- as you
9 sit here today, you don't recall where that came from or
10 how you got it or what it is; is that what your testimony
11 is?

12 A. I don't recall it being a \$16 million investment.

13 Q. Well, Mr. Kenner, your financial statement says it's
14 worth \$16 million, doesn't it?

15 A. It says 50 percent or \$33.165 million is \$16.85
16 million, that's correct.

17 Q. And that's your financial statement attached to this
18 e-mail where you approved everything in that financial
19 statement; isn't that correct?

20 A. That appears to be the fact.

21 Q. As you sit here today, you don't recall what that
22 \$16 million investment is; is that your testimony?

23 A. No. But if you give me all the banking records from
24 all the Hawaiian bank accounts and the e-mail thread that
25 I don't have, I'd be glad to put it together for you.

Kenner - Cross/Leonardo

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1 Q. Mr. Kenner, you're a financial advisor, aren't you?

2 A. No, ma'am, I'm not.

3 Q. Well, you were a financial advisor before your
4 incarceration; is that correct?

5 A. Actually, in and through December of 2014, when
6 Mr. Lambert identified me as his financial advisor, that's
7 correct.

8 Q. After your incarceration in November of 2013, you
9 were a financial advisor, correct?

10 A. Yes.

11 Q. As you sit -- as a financial advisor, as you sit here
12 today, you can't account for or recall where your \$16
13 million equity investment comes; is that what you're
14 testifying to?

15 A. I can't recall the specifics of this February 2006.

16 Q. Of the \$16 million investment; is that what you're
17 saying?

18 A. That's exactly what I'm saying.

19 Q. Mr. Kenner, I think that you testified earlier that
20 you were not aware of the operating agreement, or you
21 hadn't seen the operating agreement -- withdrawn.

22 You hadn't seen the operating agreement for the
23 Diamonte project until six months after the closing; is
24 that what you testified to?

25 A. That sounds about right. That's when I saw the

Kenner - Cross/Leonardo

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1 signed operating agreements.

2 Q. Did you see unsigned agreements prior to closing or
3 immediately after the closing?

4 A. I think there were a number of draft agreements.

5 Q. Do you know if there were any changes in the draft
6 agreements from prior to -- withdrawn.

7 How many changes were there to the draft
8 agreements prior to closing?

9 A. I don't recall, but I remember being sent several
10 different drafts.

11 Q. What date was the Lehman closing for Mexico?

12 A. March 26, 2006.

13 Q. Were there any changes to the agreements between
14 March 6, 2006 and March 25, 2006?

15 A. I have no idea. I didn't deal with Lehman Brothers'
16 attorneys, nor was I dealing with Mr. Markowitz and/or
17 Mr. Najam with respect to any of those agreements or the
18 construction of them prior.

19 Q. Now, I'm going to show the witness what's marked as
20 93. (Handing.)

21 Mr. Kenner, do you recognize Exhibit 93?

22 A. I've reviewed it.

23 Q. Okay. Mr. Kenner, those operating agreements were
24 sent to you on or about March 6, 2006; isn't that correct?

25 A. It says that on the document. I don't know if these

Kenner - Cross/Leonardo

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1 are the operating agreements that came from the e-mail.

2 Q. Mr. Kenner, you also produced these documents to the
3 SEC, didn't you?

4 A. Did they have BS SEC Date stamps on them? I guess --
5 I believe we did.

6 Q. Okay. So the first page of the e-mail it's Bates
7 Stamped Number 015885; do you see that?

8 A. Yes, I do.

9 Q. Okay. And the operating agreement, looking at the
10 next number, is operating agreement shows the next number
11 as 86; do you see that?

12 A. Yes, I do.

13 MS. LEONARDO: Your Honor, I'd offer Exhibit 93
14 into evidence.

15 MR. HALEY: Your Honor, I have no objection,
16 except for the following, and I would simply like to
17 stipulate this again involves CSL properties, one of the
18 properties that the government seeks to forfeit as a
19 result your post verdict -- I'm just repeating the
20 objection. Otherwise I have no objection to it being
21 authenticated by my client.

22 MR. CONWAY: No objection, Judge.

23 THE COURT: Received.

24 (Government's Exhibit 93 in evidence.)

25 Q. Mr. Kenner, I believe you testified on Monday that

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1 you did not know what Diamonte Properties was; isn't that
2 correct?

3 A. Since Monday I realized which LLC that was, because I
4 think that name was used on several other occasions.

5 Q. Well, in fact, Mr. Kenner, you are listed as a member
6 of Diamonte Properties LLC, aren't you?

7 A. Yes. I believe I am on the Diamonte Properties LLC.

8 Q. And, in fact, you're listed as a 6.5-percent owner of
9 that entity; isn't that correct?

10 A. I believe that's what it says on the Cabo
11 contribution page.

12 Q. And that's page, Bates stamped on the bottom, 15906;
13 isn't that correct?

14 A. Yes.

15 Q. Mr. Kenner, you were also aware, weren't you, that
16 prior to the closing, that Lehman Brothers was not going
17 to allow any transfers until the loan was paid in full;
18 isn't that correct?

19 A. I'm not sure if I was aware of that or not, as I sit
20 here today.

21 MS. LEONARDO: Now, I'm going to show the
22 witness what's marked as Exhibit 92. (Handing.)

23 A. I have reviewed this document.

24 Q. Mr. Kenner, that document is an e-mail sent to you,
25 correct?

Kenner - Cross/Leonardo

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1 A. Yes.

2 MS. LEONARDO: Your Honor, I offer Exhibit 92 in
3 evidence.

4 MR. HALEY: No objection, your Honor.

5 MR. CONWAY: No objection.

6 THE COURT: 92 is admitted.

7 (Government's Exhibit 92 in evidence.)

8 Q. Mr. Kenner, that e-mail is dated March 7, 2006; do
9 you see that?

10 A. Yes, I do.

11 Q. In that document Mr. Lehtinen is telling you,
12 Mr. Jowdy and Mr. Markowitz that Lehman is not allowing
13 any further transfers until Lehman is paid off in full; do
14 you see that?

15 A. I see that it says that, but that's inaccurate.

16 Q. When you received this on March the 1st, 2006, and
17 that was prior to the closing; isn't that correct?

18 A. Both of those statements are correct.

19 Q. So you're saying you didn't know prior to the closing
20 that Lehman was going to forbid any further transfers?

21 A. Now that I have seen this document for the first time
22 in many years, I see that I was notified of that. But
23 that's not, in fact, what has happened since Mr. Jowdy has
24 transferred at least on six separate occasions equity from
25 his Kau Holdings to other individuals with Lehman's

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1 consent --

2 Q. Mr. Kenner --

3 A. -- to the best of my knowledge, none of the loan --
4 the loan has not been paid off.

5 Q. Mr. Kenner, the question to you is actually, again,
6 quite simple.

7 Prior to the closing you were aware, were you
8 not, that you were aware prior to the closing that Lehman
9 is going to prohibit any further transfers; isn't that
10 correct?

11 A. According to this e-mail, I was notified by
12 Mr. Lehman that to be the fact.

13 Q. Mr. Kenner, you testified on Monday with regard to
14 the Sugar Mill property that you've been paying the real
15 estate taxes on that property; is that right?

16 A. I have contributed to make tax payments on that, to
17 the best of my knowledge.

18 Q. What do you mean by that?

19 A. Taxes had to be paid on several of the properties
20 that were not included or ultimately engaged in the joint
21 venture agreement, and I recall making several property
22 tax payments on some of the lots.

23 Q. And what was the amount of the tax payments for the
24 Sugar Mill property?

25 A. I don't recall, as I sit here today.

Kenner - Cross/Leonardo

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1 Q. You don't recall how much you paid for the Sugar --
2 the taxes on the Sugar Mill property?

3 A. I don't recall.

4 Q. Do you recall when was the last time that you made a
5 payment to that property?

6 A. To the best of my recollection, payments were most
7 likely made through 2008.

8 Q. Mr. Kenner, the property is also known as Little
9 Kamawatsu; is that correct?

10 A. I don't believe so.

11 Q. Mr. Kenner, you testified on Monday that you were
12 going to sell the property and donate the proceeds to a
13 charity; is that correct?

14 A. Yes, that is correct.

15 Q. The Sugar Mill property, though, was bought with the
16 proceeds of the Hawaii investments; isn't that correct?

17 A. Yes, that is correct.

18 Q. And you never had any discussions with any of your
19 investors of your intent to sell it and donate the
20 proceeds; is that correct?

21 A. That's incorrect.

22 Q. Which investors did you speak to?

23 A. I don't recall. But whatever investors I was still
24 speaking with in 2013, I notified them that I was putting
25 it for sale, and that I negotiated a tax forbearance on

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1 the property and that the proceeds pursuant to the 501c3
2 rules would need to be donated to a not-for-profit
3 charity. And that's what I intended to do, to donate to
4 the Brain Cancer Research Foundation I was raising money
5 for.

6 Q. As you sit here today, you don't recall which
7 investors you spoke to; isn't that correct?

8 A. I recall speaking to a number of investors. There
9 was a number of them that I was still dealing with --

10 Q. Well, as you sit here today, who did you speak to
11 about selling the Sugar Mill property?

12 A. Like I said, I spoke to a number of them. I don't
13 recall specifically which ones.

14 Q. As you sit here today, you cannot name one single
15 investor that you spoke to --

16 A. Mattias Norstrum was one of the investors that I
17 spoke to -- I spoke to him regularly until it was
18 determined by Mr. Jowdy to cut off communications with me.

19 Q. So you actually testified that you negotiated a tax
20 forbearance, right?

21 A. I did negotiate a tax forbearance on the property.

22 Q. You did not pay the real estate tax; isn't that
23 correct?

24 A. I wasn't responsible for it. The project was
25 responsible for it. It had been managed by John Kaiser

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1 from December 31st of 2007 forward.

2 MS. LEONARDO: Your Honor, I'm just going to
3 show the witness what's marked as Exhibit 94. (Handing.)

4 A. Okay. I've reviewed the document.

5 Q. Mr. Kenner, you also testified on Monday that you
6 paid the real estate taxes for eight straight years
7 yourself; isn't that correct?

8 A. I don't believe I said that.

9 Q. Okay. I'm going to direct your attention to page 73
10 of the transcript from Monday:

11 "And after eight years of Lehman paying the real
12 estate taxes, finally, since there was nothing else do, I
13 just decided to collapse it and attempt to sell it in or
14 about 2013, and donate the funds to a Brain Cancer
15 Research Foundation that I had raised money for."

16 That was your testimony on Monday, wasn't it?

17 A. That sounds like it. That was my testimony from
18 today.

19 Q. Okay. So let me -- the document in front of you is a
20 printout from the web site of the County of Hawaii tax
21 office; do you see that?

22 A. Yes, ma'am, I do.

23 Q. And the owner's name of that property is listed as
24 the Honu'apo Historical Society, H-O-N-U apostrophe A-P-O,
25 Historical Society, correct? And the mailing address is

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1 in care of Phil Kenner; isn't that correct?

2 A. Yes, it is.

3 Q. And that says that your Cactur Road address is
4 Scottsdale, Arizona, correct?

5 A. Yes, it is.

6 Q. And this is the same property which you referred to
7 as the Sugar Mill property, correct?

8 A. The Cactus Road property, no.

9 Q. No. This property is known as the Sugar Mill
10 property, correct?

11 A. I would agree with that.

12 MS. LEONARDO: Your Honor, I offer Exhibit 94 in
13 evidence.

14 MR. HALEY: No objection, Judge.

15 MR. CONWAY: No objection, your Honor.

16 THE COURT: 94 is admitted.

17 (Government's Exhibit 94 in evidence.)

18 Q. Mr. Kenner, looking at page 3 of that document for
19 the tax period -- the very first column, it says the tax
20 period, real property tax, original due date, there are
21 penalties, there's interest, there's tax that was due, and
22 the final amount is approximately \$19,000; do you see
23 that?

24 A. Yes, I do.

25 Q. And then there are indications of real property taxes

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1 that were due through 2012 for the period of 2012, 2013,
2 and then obviously 2014 and 2015 is when you were
3 incarcerated, correct?

4 A. I was incarcerated in 2013.

5 Q. Well, right. In 2014 and 2015, you were still in
6 jail, right?

7 A. Yes, I was.

8 Q. And the total tax due on that property is
9 approximately \$37,000; do you see that?

10 A. Yes, I do.

11 Q. And in 2013 when you tried to sell this property that
12 was around the same time that you were selling the
13 Discovery Harbor lots, correct?

14 A. I believe that was in or about the same time that
15 Discovery Harbor lots were sold to raise capital to pay on
16 the Jowdy litigation behalf of the investors.

17 Q. But it says on this property on behalf your investors
18 to raise money to fight Mr. Jowdy or the settlement; is
19 that correct?

20 A. Yes, ma'am.

21 Inside the rules and restrictions by the
22 government 501c3 corporation, it would have been illegal
23 to take the funds and proceeds from the 501c3 and use them
24 for any purpose other than a charitable donation.

25 Q. And your purchase of that property did not benefit

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1 your investors in Hawaii; is that correct?

2 A. That is absolutely incorrect.

3 Q. Now, you testified on -- I'm sorry -- withdrawn.

4 In about 2010, do you recall Mr. Constantine
5 being sued by AZ Eufora Partners, Mr. Hughes and
6 Mr. Ridley, in the Superior Court in Arizona, do you
7 recall that?

8 A. I do.

9 Q. Okay. Do you recall being asked to provide
10 information for Mr. Stolper with regard to allegations in
11 the complaint?

12 A. I do.

13 Q. Do you recall telling Mr. Stolper in response to
14 allegations in the complaint that you were not sure
15 whether or not John Kaiser had ever signed an agreement
16 with Constantine on behalf Little Isle IV, that you were
17 the managing member of Little Isle IV, not Kaiser, and
18 Kaiser has never been a member of Little Isle IV, do you
19 recall telling Mr. Stolper that?

20 A. I do. And the last portion of that is inaccurate
21 because Mr. Kaiser and Mr. Manfredi were both Little
22 Isle IV members in December of 2003 -- in 2004.

23 MS. LEONARDO: I'm going to show the witness
24 what is marked as Forfeiture Exhibit 96. (Handing.)

25 Q. Mr. Kenner, looking at Exhibit 96, is that the e-mail

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1 you sent to Mr. Stolper?

2 A. I don't recall specifically.

3 Q. Let me show you what's marked as Forfeiture

4 Exhibit 95. (Handing.)

5 THE COURT: Ms. Leonardo, I'm just letting you
6 know, I'm giving you another 15 minutes, and then you have
7 to finish up. I've been very generous.

8 MS. LEONARDO: Your Honor, I should be done by
9 then.

10 THE COURT: Okay.

11 Q. Mr. Kenner, looking at what's marked as Exhibit 95,
12 that's the complaint against Tommy Constantine and other
13 individuals, correct?

14 A. Yes.

15 THE WITNESS: Your Honor, this is a large
16 document. Do you want me to review the whole document?

17 THE COURT: No. She just wants know at this
18 point who brought it.

19 What's your question?

20 MS. LEONARDO: Your Honor, my question in
21 conjunction with Exhibit 96, where Mr. Kenner is
22 responding to questions from Mr. Stolper, specifically to
23 paragraph 8 on page 12. The allegations are that
24 Mr. Kaiser entered into consulting agreements with
25 Constantine Management Group to raise money for Little

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1 Isle IV, of which Kaiser was a member, and Mr. Kenner's
2 corresponding response in paragraph E, I'm not sure that
3 Kaiser ever signed an agreement with Constantine on behalf
4 Little Isle IV. Kenner was a management member, and
5 Kaiser has never been a member of Little Isle IV LLC."

6 THE COURT: Why don't you look at paragraph E of
7 Exhibit 95 with the e-mail in 96.

8 What's the question?

9 MS. LEONARDO: Judge, the question is: Did he
10 represent to Mr. Stolper that Kaiser has never been a
11 member of Little Isle IV.

12 THE COURT: I think your said he did, but that
13 was inaccurate.

14 THE WITNESS: That is correct, because when we
15 purchased the first property, your Honor, in December of
16 2003, it was originally in Mr. Kaiser and Mr. Manfredi's
17 name, and we transferred it into a purchase by Little
18 Isle IV. So Mr. Kaiser and Mr. Manfredi were members with
19 the original purchase before we broke everybody out within
20 the next year with the individual holding companies.

21 MS. LEONARDO: Your Honor, I offer 95 and 96
22 into evidence.

23 MR. HALEY: No objection.

24 MR. CONWAY: No objection.

25 THE COURT: 95 and 96 are admitted.

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1 (Government's Exhibits 95 and 96 in evidence.)

2 Q. Mr. Kenner, when you sent the e-mail, Exhibit 96, to
3 Mr. Stolper, did you ever correct your statement?

4 A. I'm sure I made sure Mr. Stolper was aware of that.

5 Q. Do you have any documents or correspondence or
6 e-mails that reflect that?

7 A. No. I'm sure that probably happened over a phone
8 call with Mr. Stolper. But I'm sure Mr. Kaiser would
9 verify that in December of '03 he was a member of Little
10 Isle TV

11 Q. Do you know if Mr. Stolper ever changed his answer or
12 counterclaims in that lawsuit based on information that
13 you gave him?

14 THE WITNESS: Would you like me to review that,
15 your Honor, the counterclaim?

16 Q. No, my question was: Do you know if he changed the
17 responses to that in response to your e-mail and after you
18 told him things were different?

19 THE COURT: She wants know whether you're aware
20 of any subsequent amendment to this document that was put
21 before the Court.

22 Are you aware that another document -- another
23 document was filed later correcting that with the Court?
24 In other words, paragraph 8, that was ever corrected in a
25 subsequent document to the Court, that you're aware of?

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1 THE WITNESS: Well, paragraph 8, your Honor,
2 was, I believe, part of the complaint.

3 MR. HALEY: Yes.

4 THE COURT: It says he was a member in
5 paragraph 8, right?

6 MR. HALEY: Thank you. That was going to be my
7 objection.

8 THE COURT: So you're saying that paragraph 8 is
9 accurate in the court document?

10 THE WITNESS: Well, I believe this is
11 Mr. Constantine's reply to the lawsuit. So what's in here
12 is represented by Mr. Constantine, if I'm reading the
13 document correctly. So it's Mr. Constantine's amended
14 answer.

15 THE COURT: Okay.

16 THE WITNESS: And I believe that he is correct
17 that Mr. Kaiser was a member, otherwise Mr. Kaiser and
18 Mr. Manfredi would have not had any equity ownership in
19 the very first property we purchased in Hawaii until a
20 year and a half later when we broke out all the LLCs. He
21 would have been left without equity during that period of
22 time, which wouldn't make any sense.

23 Q. Well, Mr. Kenner, my question is very simple.

24 In the e-mail you represent -- you write -- you
25 wrote that e-mail said Mr. Kaiser was never a member of

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1 Little Isle IV, didn't you write that?

2 A. That is correct. I did write that.

3 Q. That is the question.

4 A. And it was changed.

5 Q. Mr. Kenner, you testified on Monday, that --

6 MS. LEONARDO: And, Judge, I believe it is my
7 last exhibit.

8 Q. You testified on Monday that Mr. Peca breached the
9 agreement that you had with him in regards to the comps;
10 is that right?

11 A. Yes, he did.

12 Q. When did Mr. Peca buy the unit?

13 A. 2008.

14 Q. I'm going to show you what's been marked as
15 Forfeiture Exhibit 106. (Handing.)

16 Is that an e-mail that you received from
17 Mr. Peca?

18 A. It appears to be.

19 Q. And, in fact, didn't you tell the SEC that Mr. McKee
20 and Mr. Peca owned the Palms units with Mr. Kaiser and
21 Mr. Constantine? You told them that, didn't you?

22 A. In or about what year?

23 Q. In -- when you spoke to the SEC, you told them that
24 McKee and Peca owned the units with Kaiser and
25 Constantine; isn't what you testified to?

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1 A. I'm just asking what year was the SEC.

2 Q. 2011.

3 A. In '11. That sounds as if it were accurate, 2011.

4 Q. But you didn't tell the SEC at any time that you
5 owned the units or claimed to own the units along with
6 Mr. Peca, correct?

7 A. I don't recall if they asked me prior to 2011 if I
8 had any ownership. I don't recall if they asked me that.

9 MS. LEONARDO: Your Honor, I'm sorry, I have one
10 more exhibit.

11 THE COURT: Are you offering this one?

12 MS. LEONARDO: Yes, your Honor, I'm offering
13 that into evidence.

14 MR. HALEY: No, no, Judge. She said she only
15 had one more exhibit. No objection.

16 MR. CONWAY: No objection.

17 THE COURT: 106 is admitted.

18 (Government's Exhibit 106 in evidence.)

19 MS. LEONARDO: I'm showing the witness what is
20 marked as Exhibit 105.

21 Q. Mr. Kenner, looking at Exhibit 105, is that a wire
22 transfer that you caused to be made on behalf of Mr. Peca,
23 or Mr. Peca sent it to you?

24 A. This is a wire transfer that I signed on behalf -- in
25 and around September of 2005 for Mr. Peca with his

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1 authority to wire transfer funds from his Charles Schwab
2 account to Baha Development Corporation for a provision
3 for an equity stake in the CSL properties.

4 Q. And that was the \$200,000 investment, correct?

5 A. Yes.

6 Q. And for that he received a 10-percent interest in the
7 CSL properties, right?

8 A. I believe he did.

9 Q. For each \$100,000, the individual got five-percent
10 interest, correct?

11 A. That's how it worked out in the end.

12 MS. LEONARDO: May I have one moment, your
13 Honor?

14 THE COURT: Are you offering 105?

15 MS. LEONARDO: Yes, I'm offering 105.

16 MR. HALEY: No objection.

17 MR. CONWAY: No objection.

18 THE COURT: 105 is admitted.

19 (Government's Exhibit 105 in evidence.)

20 MS. LEONARDO: Your Honor, I have no further
21 questions.

22 THE COURT: Do you want to take the lunch break,
23 Mr. Conway?

24 MR. CONWAY: Yes. I think that would be best,
25 your Honor.

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1 THE COURT: Okay.

2 MR. CONWAY: I don't expect to be long.

3 Mr. Oliveras is going to be doing the cross, but
4 I don't expect it to be much more than a half hour or so.

5 THE COURT: All right. And are you still intent
6 on calling Agent Wayne?

7 MR. CONWAY: Briefly, yes. It will be 15
8 minutes.

9 THE COURT: Okay. And that would be redirect, I
10 assume?

11 MR. HALEY: Yes, your Honor. That would be very
12 limited.

13 THE COURT: 1:45. All right.

14 MR. HALEY: Thank you.

15 (Luncheon recess taken at this point.)

16 (Continued on next page.)

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1 A F T E R N O O N S E S S I O N

2

3 THE COURT: Please be seated.

4 (The witness resumes the stand.)

5 THE COURT: Mr. Conway, go ahead.

6

7 CROSS-EXAMINATION

8 BY MR. OLIVERAS:

9 Q. Good afternoon, Phil.

10 A. Good afternoon.

11 Q. Do you mind if I call you Phil?

12 A. That's fine.

13 Q. You testified that Etan Moreau sued Mr. Constantine
14 after breaching their agreement to purchase his one
15 bedroom studio at the Palms; is that correct?

16 A. Yes, I recall that.

17 Q. Did you have anything to do with helping
18 Mr. Constantine defend that lawsuit?

19 A. Not that I recall.

20 Q. Did you provide any monetary help to Mr. Constantine
21 with regards to that lawsuit?

22 A. I think I made an initial deposit with his attorney.

23 Q. Do you know who his attorney was?

24 A. It was Tom Baker of Arizona.

25 Q. Do you know how much that was for?

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1 A. I believe it was \$5,000.

2 Q. When you paid Mr. Baker as his attorney, was there
3 ever a point in time when he said, hey, send me \$75,000
4 from the fraud scheme?

5 A. No.

6 Q. It wasn't anything like that at all, was it?

7 A. No, it was not.

8 Q. You were simply advancing \$5,000 for the lawsuit for
9 your client?

10 A. That is correct.

11 Q. You even notified Baker's office that you were
12 providing the payment of \$5,000 specifically for the
13 Moreau case; isn't that right?

14 A. That's correct.

15 Q. I would like to show you what's been marked as
16 Defense Exhibit FFC-1.

17 MR. OLIVERAS: Your Honor, may I approach? I
18 have a copy for the Court of all of the exhibits we plan
19 on using.

20 THE COURT: Thank you.

21 BY MR. OLIVERAS:

22 Q. Do you recognize what's been marked as Exhibit FFC-1?

23 A. It looks familiar, yes.

24 Q. Do you know what it is?

25 A. This was an e-mail I sent to Mr. Baker's assistant,

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1 Trish, and copied Mr. Constantine in February of '09,
2 confirming the \$5,000 deposit that I previously mentioned
3 for the case between my former client, Mr. Moreau, and
4 Mr. Constantine regarding the Palms unit.

5 MR. OLIVERAS: I would like to move this into
6 evidence.

7 THE COURT: Any objection?

8 MS. LEONARDO: No objection, your Honor.

9 MR. HALEY: No, sir.

10 THE COURT: FFC-1 is admitted.

11 (Defense Exhibit FFC-1 in evidence.)

12 BY MR. OLIVERAS:

13 Q. Mr. Kenner, did you expect to be repaid the \$5,000 by
14 Mr. Constantine?

15 A. I don't recall.

16 Q. Did you also pay \$15,000 to Gilmartin, Magence and
17 Ross?

18 A. Yes, I did, I believe I did on several occasions.

19 Q. And just like with the payment to the lawyer, did
20 there ever come a time when you say, hey, let's take this
21 \$15,000 and pay Gilmartin?

22 A. No, I did not.

23 Q. So the \$700,000 alleged fraud, Mr. Constantine
24 received \$500 twice directly the aforementioned \$5,000
25 paid to Mr. Constantine's attorney to defend the Moreau

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1 lawsuit, and the \$15,000 mortgage payment to Gilmartin
2 Magence & Ross; is that correct?

3 A. That sounds accurate.

4 Q. Did you expect to get the \$15,000 repaid?

5 A. I don't recall.

6 Q. As a separate matter, didn't you previously also pay
7 for Mr. Constantine's defense of the lawsuit filed against
8 him by your other client, Mr. Juneau?

9 A. In California, yes, I did.

10 I think I forwarded \$20,000 to Mr. Constantine's
11 California lawyer.

12 Q. Did you expect to have that repaid?

13 A. I don't recall at the time.

14 Q. I would like to show you what's been marked as
15 Exhibit FFC-2.

16 Do you recognize what's been marked as FFC-2?

17 A. Yes, I do remember this.

18 Q. Did you write this?

19 A. Yeah, I wrote the bottom e-mail to my banker at Bank
20 of America for the \$20,000 advance, and I wrote the top --
21 the third response -- excuse me -- the second response.

22 Q. What was that response?

23 A. Sorry. I wrote the response above it to
24 Mr. Constantine about three months later just asking if I
25 could be repaid the \$20,000.

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1 Q. Have you made payments for Mr. Constantine at other
2 times for items?

3 A. Yes, I have.

4 Q. Did you expect to be repaid for those?

5 A. For some of them I'm sure I did.

6 Q. Do you find it likely that you would have been
7 expected to be repaid for the 15,000 and the \$5,000
8 payments?

9 A. It would make sense that I would.

10 Q. So of the entire \$700,000 alleged fraud, he
11 essentially received a loan for a grand total of \$21,000?

12 A. That sounds accurate.

13 MR. OLIVERAS: I would like to move FFC-2 into
14 evidence.

15 MS. LEONARDO: No objection, your Honor.

16 MR. HALEY: No objection.

17 THE COURT: FFC-2 is admitted.

18 BY MR. OLIVERAS:

19 Q. Mr. Kenner, I would like to talk about the
20 allegations you made about Mr. Constantine regarding the
21 Global Settlement Fund.

22 You made them to your clients and in the lawsuit
23 you filed in his bankruptcy proceeding and even during
24 this trial.

25 Did you believe that those allegations were

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1 correct at the time you made them?

2 A. Yes, I was, 100 percent.

3 Q. I would like to show you what was marked by the
4 government as exhibit at trial 303

5 THE COURT: Is that in my book here?

6 MR. OLIVERAS: It should be in your book.

7 THE COURT: It's 303?

8 MR. OLIVERAS: 303. It was right before F0RF-1
9 in my book. I have it out of order. I apologize.

10 THE COURT: Okay. I got it.

11 What's the question?

12 BY MR. OLIVERAS:

13 Q. Now, the notes on the right side column of
14 Government's Exhibit 303, they're prepared by you; isn't
15 that right?

16 A. That's correct.

17 Q. Let's take a look at the transaction on 5/12/2009
18 labeled Sonneschein for \$8,000.

19 The description in the notes column says TC LA
20 attorneys, and then has a web address; do you see that?

21 A. Yes, I do.

22 Q. Sonneschein refers to Sonneschein Nat & Rosenthal,
23 LLP; is that correct?

24 A. That sounds familiar.

25 Q. I would like to draw your attention now to what's

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1 been marked as Defendant's Exhibit FFC-3.

2 This is an e-mail to Sonneschein; is that
3 correct, related to Sonneschein; is that correct?

4 A. I see attorney Ross' name as part of Sonneschein,
5 yes, in the middle of the e-mail.

6 Q. Now, as you just said, according to the e-mail, you
7 used an attorney named Rick Ross who's engaged to help
8 with the Diamante Del Mar and Cabo San Lucas project; is
9 that right?

10 A. Yes, he was.

11 He was part of the mediation Mr. Constantine
12 undertook trying to settle out the problems we had with
13 Mr. Jowdy.

14 Q. Would you consider that to be an authorized use of
15 the global settlement money?

16 MS. LEONARDO: Objection.

17 THE COURT: Overruled. You can answer that.

18 A. From my understanding, yes, it would be.

19 Q. Is this the quote unrelated matter that Sonneschein
20 handled for you that you testified about on Monday during
21 cross-examination?

22 A. No, this is different.

23 Q. Okay.

24 A. This is unrelated to my matter.

25 Q. Okay.

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1 As you sit here today, do you still believe the
2 allegations you made against Mr. Constantine with respect
3 to the Global Settlement Fund are true?

4 MS. LEONARDO: Objection.

5 THE COURT: I think he answered that already.
6 You can answer again.

7 A. Now that I understand what arrangement
8 Mr. Constantine had with Mr. Gonchar and the contribution
9 of one of the deposits into the account, I think my
10 observations were incorrect when I told my clients that I
11 thought he misappropriated funds.

12 Q. I would like to direct your --

13 THE COURT: In every instance or in this
14 instance?

15 THE WITNESS: Specific to this I was answering.
16 If there's another question, I'll answer it as well so
17 it's clear.

18 Thank you, your Honor.

19 THE COURT: All right.

20 BY MR. OLIVERAS:

21 Q. Do you have any of the allegations that you recall
22 making that you feel are still absolutely true?

23 A. Not that I recall, off the top of my head.

24 Q. Would you make similar accusations today if it were
25 to take -- if the situation were to take place and you had

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1 all of the information you had now?

2 MR. HALEY: I object.

3 MS. LEONARDO: Objection.

4 THE COURT: That's no good.

5 MR. OLIVERAS: I move FFC-3 in.

6 THE COURT: Any objection?

7 MS. LEONARDO: No objection, your Honor.

8 MR. HALEY: No objection.

9 THE COURT: FFC-3 is admitted.

10 (Defense Exhibit FFC-3 in evidence.)

11 BY MR. OLIVERAS:

12 Q. I would like to draw your attention to Government's
13 Exhibit FORF-1.

14 What is Government's Exhibit alleging as a
15 fraud -- strike that. Withdrawn.

16 Let's draw your attention to the column labeled
17 Diamante Del Mar.

18 A. Yes.

19 Q. The government's alleging a \$9.1 million loss with
20 respect to that project; is that correct?

21 A. That's what it says at the bottom, yes.

22 Q. Isn't it true that Mr. Jowdy didn't take out the
23 default on the -- take out and default on the KSI loans he
24 secretly made for \$3 million, today your client would
25 still have equity in a 60-plus million dollar free and

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1 clear piece of property?

2 A. That is correct.

3 Q. Now, just before lunch the prosecutor asked you about
4 the e-mail between you and Mr. Stolper; is that correct?

5 A. Yes.

6 Q. I believe that was FORF-96.

7 A. Yes, I remember this.

8 Q. She asked about line number 8 which states:

9 I am not sure that Kaiser ever signed an
10 agreement with Constantine on behalf of Little Isle IV.

11 Do you recall that?

12 A. Yes, I do.

13 Q. That was referring to the funding consulting
14 agreement; isn't that correct?

15 A. Correct.

16 Q. Mr. Kenner, what is the date of the e-mail?

17 A. November 27, 2010.

18 Q. Weren't both of these consulting agreements exhibits
19 in Mr. Nolan's 2008 arbitration?

20 A. In the 2009 arbitration, yes, they were.

21 Q. They're both signed by Mr. Kaiser; is that correct?

22 A. That is correct.

23 Q. And Mr. Kaiser testified on your behalf in that
24 arbitration?

25 A. Yes, he did.

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1 Q. Did he object to the authenticity at that time?

2 A. Not that I'm aware of.

3 Q. Going back to the GSF, as you sit here today knowing
4 what you know now about Mr. Constantine's arrangement with
5 Mr. Gonchar and what you now know were monies deposited by
6 Mr. Constantine into Mr. Richard's account, do you still
7 believe Mr. Constantine misappropriated any GSF funds?

8 MR. HALEY: Objection.

9 THE COURT: Do you understand the question?

10 THE WITNESS: Yes, I do.

11 THE COURT: You can answer that.

12 Go ahead.

13 A. No.

14 Now that I know what his arrangement was with
15 Mr. Gonchar, and that he deposited funds, I have no
16 problems with what he did with the money.

17 I wasn't speaking with Mr. Gonchar about the
18 time I made the allegations.

19 Q. Do you recall during the trial Mr. Kaiser testifying
20 about a piece of paper with his own handwritten notes on
21 it regarding monies that were advanced to Mr. Constantine?

22 A. If you're referring to what the government referred
23 to as a shopping list and a grocery list, yes.

24 Q. Do you recall him testifying as follows:

25 "QUESTION: And just so the record is clear, you

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1 were testifying that it was Mr. Kenner who provided the
2 information and you wrote it down; is that right?

3 "ANSWER: Yes, that is correct.

4 "QUESTION: Would you take a look at Kenner's
5 Exhibit 37.

6 Do you recognize that?

7 "ANSWER: Yes.

8 "QUESTION: Is that the document you're
9 referring to?

10 "ANSWER: Yes."

11 Do you recall that?

12 A. I do recall that testimony.

13 Q. I would like to direct you to what was labeled and
14 marked Kenner Exhibit 37.

15 MR. OLIVERAS: I apologize. I don't have the
16 official marked one. I do have the actual document. If
17 there's any question about it, we can authenticate it.

18 THE WITNESS: No problem.

19 A. I recall this document.

20 Q. Now, I'm going to direct your attention to the bottom
21 right-hand corner of Kenner Exhibit 37.

22 Can you tell me what that says?

23 A. In the box?

24 Q. Outside the box.

25 A. It says Hawaii 2.65 million and three numbers below

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1 it, 650,000, 1.5 million, 500,000.

2 Q. Mr. Kaiser testified that he did not know about the
3 payment made to Mr. Constantine regarding Hawaii, and that
4 the signatures on the consulting agreement were forgery;
5 was that right?

6 A. That's what I recall.

7 Q. But according to his own handwritten notes, it
8 appears that he not only knew of the Hawaii consulting
9 agreement, but knew the exact amount of each agreement?

10 MS. LEONARDO: Objection.

11 THE COURT: Sustained as to form.

12 BY MR. OLIVERAS:

13 Q. Mr. Kenner, do you know what those numbers underneath
14 the words Hawaii represent?

15 A. Yes, I do.

16 Q. What do they represent?

17 A. They were the three consulting loan agreements that
18 we had done with Mr. Constantine in 2004, 2005 and 2006,
19 all three of which were signed by Mr. Kaiser.

20 Q. Approximately, how much money has Mr. Kaiser invested
21 with you in total?

22 A. At this point, he's been more than fully paid back
23 for everything he invested both with me as a business
24 partner and in Hawaii. He has no funds outstanding or
25 due.

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1 Q. The question was, how much did he invest with you?

2 A. In Hawaii, on behalf of some of his friends and
3 family, I believe the total was 1.1 million and he was
4 paid back 1.176 million after the August 2006 closing.

5 It's reflect on the banking statements.

6 In California he invested approximately \$1.3
7 million on our California beach house project, and he was
8 paid all of those funds back in full as verified by bank
9 statements and used in the defense of his own case in
10 Arizona, and Mr. Kaiser invested -- he purchased \$500,000
11 of my ownership of a third property called Los Frailes in
12 Mexico in October of 2008.

13 Q. He still owns that?

14 A. He still owns that portion, yes. Those funds are all
15 separate and apart from this document. This document has
16 nothing to do with Mr. Kaiser or his money.

17 Q. What was this document then?

18 MR. HALEY: Judge, for purpose of clarity of the
19 record, I think he's referring to exhibit 37.

20 THE WITNESS: Yes, sir.

21 THE COURT: Yes.

22 A. This is a document that Mr. Kaiser turned over to me
23 after he had made a transcription of the same document I
24 kept as a list of funds transfers between myself and
25 Mr. Constantine with a few other peripheral notes which

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1 included that Hawaii consulting money.

2 And on December 6th I believe Mr. Constantine,
3 excuse me, Mr. Kaiser, while he was at my residence in
4 Arizona, copied it on to his own handwriting and faxed a
5 copy of this document and the next document in the PK home
6 Bates stamp sequence which would have been 12,010. That
7 was my original document somewhere as evidenced by the
8 time stamp on the top left corner of this document.

9 And if I recall correctly, also PK home-12010, I
10 found out about Mr. Kaiser transposing my document into
11 his own handwriting six days later when he sent me a text
12 message asking if it was all right that he copy my
13 handwritten document.

14 Q. I'm going to show you now what's been marked as
15 defendant's exhibit FFC-4.

16 I'll ask you to review it.

17 (Pause in proceedings.)

18 A. Okay, I recognize these.

19 Q. What are they?

20 A. These are a series of text messages from June of 2010
21 through February of 2011, that I believe were all sent to
22 me by Bryan Berard. Yes, all of them were sent to me by
23 Bryan Berard.

24 Q. You received those messages?

25 A. Yes, I did.

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1 Q. Do you recall reading them when you got them?

2 A. Yes, I do.

3 Q. Are they a fair and accurate representation of what
4 you received back in 2010?

5 A. And 2011, yes.

6 MR. OLIVERAS: I would like to move these into
7 evidence.

8 MS. LEONARDO: Your Honor, I would have an
9 objection because there's absolutely no indication on what
10 phone number these text messages are coming to or where
11 this came from in this particular format.

12 It appears somebody re-created the text messages
13 and there's absolutely no indication what number these
14 texts were sent to.

15 THE WITNESS: I can address that, your Honor.

16 MR. HALEY: I have no objection.

17 It's kind of like creating a chart, the
18 government takes -- they take various information from
19 various -- I have no objection.

20 THE COURT: I think, didn't we have these in the
21 trial too?

22 MR. OLIVERAS: Yes, your Honor.

23 THE WITNESS: Yes, sir.

24 THE COURT: Can you explain that? The issue
25 that it doesn't show what number it came from or went to I

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1 guess?

2 THE WITNESS: If you do look on the left column,
3 for example, the first one is 13,801.

4 That was the sequential text stamp that was
5 delivered to us during Rule 16 by the government after the
6 seizure of my iPhone totaling approximately 89,000 text
7 messages, so they were text delineated ASCII file.

8 THE COURT: I remember that.

9 The objection is overruled. FFC-4 is admitted.

10 (Defense Exhibit FFC-4 in evidence.)

11 BY MR. OLIVERAS:

12 Q. I draw your attention to what's been marked as FFC-5.

13 A. Yes, I recall this.

14 Q. Can you tell us what that is?

15 A. This is similar to the text messages from Bryan
16 Berard, but these are from Michael Peca to me in July of
17 2010.

18 It's referencing Peca telling me that if he
19 can't be part of the loan buyout at Eufora, then there's
20 going to be a lynching, meaning a lot of guys, everybody
21 should have a chance to buy the loan from Eufora that
22 Michael Stolper was dealing with at the time and being
23 headed up by Tim Gaarn and CR Gentry, and Peca is asking
24 me if the money has already been collected and whose money
25 is sitting in escrow at that point in time.

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1 And this is, I think I saw on the Berard texts,
2 it's the coordination of Berard and speaking to all of the
3 other investors about that money, putting money together,
4 excuse me.

5 Q. I'm asking if you recognize it.

6 A. Yes.

7 Q. Thank you.

8 So you recognize it then?

9 A. Yes, I do.

10 Q. Do you recall receiving those?

11 A. Yes, I do.

12 Q. Are they fair and accurate representations of the
13 texts you had received at that time?

14 A. Yes, they are.

15 MR. OLIVERAS: I would like to move FFC-5 into
16 evidence.

17 MS. LEONARDO: Judge, I have the same objection
18 that I had earlier.

19 THE COURT: This is the way the government
20 produced these though.

21 MS. LEONARDO: In addition, your Honor, I find
22 it difficult to believe the witness remembers this text
23 message from six years ago.

24 THE COURT: Overruled.

25 You have no objection?

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1 MR. HALEY: I don't have any objection.

2 THE COURT: Okay. FFC-5 is admitted.

3 (Defense Exhibit FFC-5 in evidence.)

4 BY MR. OLIVERAS:

5 Q. Now, do you recall what the -- withdrawn.

6 Do you recall the government's theory of the
7 case changing from time to time?

8 MS. LEONARDO: Objection.

9 THE COURT: Let's stick to the facts.

10 BY MR. OLIVERAS:

11 Q. When did you learn of the government's disclosure
12 problem theory?

13 MS. LEONARDO: Objection.

14 THE COURT: Again, sustained.

15 BY MR. OLIVERAS:

16 Q. I would like to draw your attention to what's marked
17 as FFC-6.

18 Do you recognize that?

19 A. Yes, I do.

20 Q. Can you tell me what that is?

21 A. This was a text message from Mattias Norstrom to
22 myself on March 19, 2008, as a result of Norstrom
23 investing in Eufora and buying the private stock from
24 Mr. Constantine, and I sent a fax on to Mr. Norstrom, as I
25 did with all my clients, after signing as power of

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1 attorney.

2 Mr. Norstrom was requiring that it was
3 Constantine Management Group selling the stock and that's
4 why I respond yes, that is where the one percent is being
5 transferred from, and he responded that he sent the fax on
6 to Wells Fargo for confirmation.

7 (Continued on next page.)

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1 BY MR. OLIVERAS:

2 Q. So does this text indicate that Mr. Norstrum was made
3 aware by you that the ownership interest that he was
4 purchasing was being purchased from CMG?

5 A. Yes. This is the same as each of the investors from
6 me, or others, whether from CMG or from Tim Gaarns,
7 standard managers, or any of the other previous investors
8 that were being bought out of private positions.

9 Q. And this is prior to the sale being completed?

10 A. I believe so.

11 Q. Why didn't you bring the text message to anyone's
12 attention at trial?

13 A. I don't recall seeing it at my preparation for the
14 trial, but I wasn't aware that anyone was alleging that
15 the individuals were unaware of the private stock
16 purchases until trial.

17 Q. When did you start searching for the members that had
18 to do this?

19 A. Immediately after trial.

20 Q. After trial?

21 A. After trial.

22 Q. Why not at the beginning of trial?

23 A. I was unaware that the government was alleging the
24 individuals did not know there were private stock
25 transactions going on.

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1 Q. Where did you get the text message from?

2 A. It came from the government's production.

3 Q. Was this message part of the binder that the
4 government produced and provided to the jury as part of
5 the text messages?

6 A. No, it definitely was not.

7 Q. And isn't Mr. Norstrum's \$100,000 investment listed
8 on Government Exhibit 41 listed as a loss?

9 A. Yes, it is. Under the Eufora CMG column.

10 Q. Mr. Kenner, you heard Agent Wayne testify that
11 Mr. Constantine had nothing do with your client's making
12 investments in Hawaii, the lines of credit, Diamonte del
13 Mar, Diamonte Cabo San Lucas or Los Friales.

14 Do you agree with that testimony?

15 A. No.

16 Q. What do you disagree with?

17 A. The initial investments in each of those properties
18 Mr. Constantine had nothing do with. With respect to
19 Diamonte del Mar, Diamonte Cabo San Lucas, Mr. Constantine
20 mediated with Mr. Jowdy and the MI Investor Group for over
21 a year before Mr. Hardy and Mr. Jowdy and Mr. Fried
22 terminated his mediation mitigation efforts.

23 Q. But as far as your client making the initial
24 investment, you had nothing do with that?

25 A. Nothing to do with Diamonte del Mar or Cabo San

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1 Lucas.

2 MR. OLIVERAS: I have no further questions.

3 THE COURT: Do you want to introduce --

4 MR. OLIVERAS: I'm sorry. I'll introduce FSC-6
5 in evidence.

6 MS. LEONARDO: No objection, your Honor.

7 MR. HALEY: No objection.

8 THE COURT: FSC-6 is admitted.

9 (Defendant's Exhibit FSC-6 in evidence.)

10 THE COURT: There are other exhibits in this
11 binder.

12 Do you mind introducing those?

13 MR. OLIVERAS: No.

14 THE COURT: All right. Any -- Mr. Haley, do you
15 have any redirect?

16 MR. HALEY: I will endeavor to keep it brief,
17 Judge.

18 THE COURT: Okay.

19 MR. HALEY: And relevant to the issues that I
20 perceive are relevant before the Court in this forfeiture
21 proceeding.

23 REDIRECT EXAMINATION

24 BY MR. HALEY:

25 Q. Phil, at the conclusion of the government's

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1 cross-examination of you approximately an hour and a half
2 ago, you were shown FOF -- FORF-55, do you recall that
3 document?

4 A. FORF-105.

5 Q. FORF-155. Do you recall that document?

6 A. Yes, I do.

7 Q. And though it speaks for itself, that is a wire
8 transfer from what account to what account, sir?

9 A. The funds were initially custodied at Charles Schwab
10 in the name of Michael Peca, Account 60374031. And on
11 September 13, 2005 or thereabouts, I would have signed
12 this document with Mr. Peca's authorization and wire
13 transferred 200,000 directly to Mr. Jowdy's Baja
14 Development Corporation account.

15 Q. What, if any -- and I'll use the word "nexus,"
16 exists between that wire transfer and any of the Hawaiian
17 land development matters involving Hawaiian land
18 development accounts or Eufora accounts or the Global
19 Settlement accounts or Sag Ledbetter accounts?

20 A. None.

21 Q. As relates to this particular wire transfer, were any
22 of those funds reflected in that wire transfer commingled
23 with any of the accounts controlled or operated by the
24 Hawaiian Land Development Entities, Eufora, Global
25 Settlement Fund or Sag Harbor Ledbetter?

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1 A. No.

2 Q. Kindly take a look at FORF-106. (Handing.)

3 As you read that particular e-mail, sir, it
4 refers to what specific transaction involving yourself?

5 A. The Palms Penthouse unit with Mr. Peca.

6 Q. What, if any, relationship or nexus exists between
7 the matters discussed in that particular e-mail and the
8 Hawaiian Land Development project, Eufora, Global
9 Settlement Fund and Sag Ledbetter?

10 A. None.

11 Q. Incidentally, the content of this document in
12 connection with statements and representations made to you
13 by Mr. Peca, are they all complete and accurate?

14 A. They are almost wholly inaccurate.

15 Q. Now, on cross-examination you were asked with
16 reference to Exhibit 73 wherein you testified that you
17 signed Stompel's -- Joseph Stompel's name to a document in
18 connection with the Constantine bankruptcy proceeding, do
19 you recall that question in that document?

20 A. Yes, sir, I do.

21 Q. Did you believe it to be in your client's interest,
22 Joseph Stompel, to see to it that a pleading was filed on
23 his behalf given the nature of the statements made in the
24 Constantine bankruptcy proceeding?

25 A. Yes, sir. Not just on Mr. Stompel, but for each of

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1 the other individuals as well.

2 Q. And how did you believe it was in your client's
3 interest to take that action?

4 A. After discussions with each of the individuals,
5 including Mr. Stompel, we concluded that they were
6 interested in having an adverse proceeding filed in
7 Mr. Constantine's bankruptcy making sure that we secured
8 certain assets that we believe could be expunged during
9 the bankruptcy.

10 So each of them authorized me to prepare and
11 then in certain cases sign the complaints and then file
12 them, and each of the individuals reimbursed me for the
13 filing fees, and I recall that specifically because it was
14 turned over as part of government evidence, the transfers
15 back to me to pay for the filing fees for each of those
16 cases. I believe they were \$313 each.

17 Q. The Ula Makika bank account, when you set up the Ula
18 Makika bank account, did it have anything do with the
19 Hawaiian Land Development project, Eufora, the Global
20 Settlement Fund or Sag Ledbetter?

21 A. No. It was originally set up for me personally.

22 Q. You were asked a question on cross-examination
23 whether you believe that the purchase of the Honu'Apo
24 property benefited your investors, and I believe you gave
25 an affirmative answer.

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1 You did believe it benefited your investors,
2 correct?

3 A. Yes. And, as I sit here today, I still believe that
4 it was benefited.

5 Q. How did it benefit your -- when I say "investors," I
6 think we know -- when I speak of investors, we're talking,
7 of course, about your hockey player client investors, and
8 how with respect to the defendant would this benefit them?

9 A. It benefited everybody involved in the Hawaii land
10 development project as a recommendation from Steve Len,
11 our attorney in -- a real estate attorney in Keylo,
12 Hawaii, because the development area in the Kabu district
13 of Hawaii was a very sensitive subject with all of the
14 locals, and my donating the 10-acre Sugar Mill property
15 which was an historic landmark to the community onto a
16 501c3, it looked like a good gesture on behalf of our
17 development group to the locals as we suggested to the
18 locals through our attorney, Steve Len, and the planning
19 director Chris Newman in Hawaii that we were going to
20 build a historical museum on the site to commemorate the
21 150 years of sugar plantation work, and the sugar mill
22 that still was erected on that property.

23 Q. Now, I'm going to show you documents that the
24 government introduced for consideration by this court on
25 Monday, and let's take a look at FORF-76, specifically

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1 paragraph 5 of that document.

2 First of all, even though the Court has the
3 document, what is this for purposes of the record?

4 A. FORF-76 is a declaration of Kenneth Jowdy in support
5 of a motion for expedited discovery filed February 27,
6 2009.

7 Q. And it's the document the government introduced for
8 consideration by this court; is that correct?

9 A. Yes, sir.

10 Q. And what does paragraph 5 of that document say?

11 A. It's referring to Mr. Jowdy. It says the following:
12 "The signature beneath my name on the last page of the
13 loan agreement document is not my signature. I believe
14 that it has been forged by someone who attempted to
15 reproduce my signature."

16 Q. In reference to FORF-80, also introduced into
17 evidence for consideration by this court, would you kindly
18 read the excerpt as provided on the document itself as
19 relates to Mr. Jowdy's answer to a particular question?

20 A. On line 17, it says, "Answer: The document in the
21 Arizona case, the forged document. He has an entire
22 testimony based on a lie. It is a forgery. I never
23 signed the document. I've never -- I never saw the
24 document until he produced it. That and -- that and the
25 entire testimony that he put in front of federal court."

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1 Q. Now, the document we're speaking of was introduced
2 into evidence during the course of this trial as revolving
3 line of credit; is that correct?

4 A. Yes, sir.

5 Q. How many signatures are on that document?

6 A. Three.

7 Q. Whose signatures are they?

8 A. My signature, Ken Jowdy's signature, Robert Gaudet's
9 signature.

10 Q. In what capacity did Robert Gaudet sign that
11 document?

12 A. He signed it as a witness.

13 Q. At the point in time that document was executed,
14 what, if any, relationship did Robert Gaudet have to Ken
15 Jowdy?

16 A. Robert Gaudet was facilitating the land acquisition
17 in Cabo San Lucas with Mr. Jowdy and was under an oral
18 employment agreement of four years, \$2 million with
19 Mr. Jowdy, and was projected to be his director of
20 marketing and sales and director of golf as Mr. Gaudet's a
21 PGA professional.

22 Q. When that document was signed bearing Robert Gaudet's
23 signature as witnessed, what, if any, relationship did he
24 have with you?

25 A. None. I had met Mr. Gaudet by that point in time

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1 perhaps one other time prior to December of 2004.

2 MR. HALEY: Judge, may I approach?

3 THE COURT: Yes.

4 Q. Phil, I'm going to ask you to take a look at Kenner
5 Exhibit F-25. I've got to give it to you, correct?

6 (Handing.)

7 A. Thank you.

8 Q. What is it?

9 A. There are two different components. One is testimony
10 that Robert Gaudet gave on day five of the Nolan
11 arbitration on May 30th of 2009 in Arizona. And the
12 exhibit attached to the testimony is a photocopy of the
13 revolving line of credit loan that Mr. Jowdy and I signed
14 in December of 2004.

15 MR. HALEY: Your Honor, I'd offer Kenner Exhibit
16 F-25 in evidence.

17 MS. LEONARDO: No objection, your Honor.

18 MR. CONWAY: No objection, your Honor.

19 THE COURT: It's admitted.

20 (Defendant's Exhibit F-25 in evidence.)

21 MR. HALEY: Your Honor, though it speaks for
22 itself, I have a very brief statement I'd like to read
23 into the record.

24 Q. Did you see where Mr. Gaudet while under oath during
25 the arbitration proceeding was asked with reference to

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1 Exhibit 79, which is attached to this document, which is
2 clearly the revolving credit line agreement.

3 "Question: Were you present when Mr. Jowdy
4 signed this credit line agreement -- this agreement,
5 forget the title, with Mr. Kenner?

6 "Answer: Yes, I was."

7 Is that how it reads?

8 A. Yes, sir.

9 Q. In addition to his testimony, Robert Gaudet's
10 testimony -- by the way, is Robert Gaudet the same person
11 who signed as the witness to the revolving line of credit
12 agreement?

13 A. Yes, he is.

14 Q. In addition to his testimony before the American
15 Arbitration Association, was there also an instance during
16 the course of the litigation involving Glenn Murray
17 against Ken Jowdy where that particular document was
18 referenced?

19 A. Yes, sir.

20 Q. And would you supply to the court -- were you present
21 in court that day?

22 A. Yes, I was, as a third-party crossover claim.

23 Q. Would you describe to the Court, as you recall the
24 circumstances, under which that document was presented to
25 the Court?

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1 A. Mr. Jowdy in his defense of the lawsuit in -- his
2 counsel authenticated the document as a real document
3 contending that if Mr. Jowdy has that document and the
4 ability to borrow money, why was he borrowing separate
5 money from Mr. Murray at the time.

6 Q. Who offered that document to the Court as an
7 authentic document during the course of that litigation?

8 A. Mr. Jowdy's attorneys authenticated the document.

9 Q. Phil, in connection with that proceeding, is there a
10 transcript of that proceeding reflecting the substance of
11 what you just affirmed under oath as to the manner in
12 which that document was utilized during the course of that
13 deposition -- excuse me -- during the course of that
14 trial?

15 A. Yes, it is.

16 Q. Is there yet a third instance where Robert Gaudet --
17 withdrawn.

18 Is there yet another instance where Robert
19 Gaudet testified in a judicial proceeding concerning his
20 signature as a witness to the loan agreement?

21 A. Yes, sir. There was a verification.

22 Q. And when and where did that occur?

23 A. Mr. Jowdy and his Arizona attorneys called him as a
24 witness to be deposed on, I believe, July 2, 2009 to
25 authenticate the revolving line of credit in the Arizona

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1 case with Phil Kenner against Ken Jowdy.

2 Q. Was Robert Gaudet deposed?

3 A. Yes, sir, he was.

4 Q. What was the name for that deposition?

5 A. It was to -- it was part of the request for expedited
6 discovery in that case for the authentication of the line
7 of credit document.

8 Q. Well, did that involve a videotaped deposition?

9 A. Yes, sir. He was video'd during that disposition.

10 Q. Is there a transcript, to your knowledge, in
11 existence of that videotaped deposition?

12 A. Yes, sir. I saw both of them during the pretrial
13 exhibit production.

14 Q. During the course of that deposition, was his
15 testimony, to your knowledge, in any way inconsistent with
16 his prior testimony in the American Arbitration
17 Association that he was a third-party witness to the
18 document signed by both you and Ken Jowdy, which we know
19 as the loan agreement?

20 A. No, it was wholly consistent.

21 Q. To your knowledge, these three documents, the
22 deposition testimony in the American Arbitration
23 Association matter, the deposition of the transcript
24 involving a lawsuit filed by Glenn Murray against Ken
25 Jowdy, and the deposition transcript as relates to the

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1 proceeding involving Little Isle and other plaintiffs
2 against Ken Jowdy, have those three transcripts,
3 testimony, been in the possession of the government before
4 they introduced to this court for the Court's
5 consideration, FORF-76 and FORF-80?

6 MS. LEONARDO: Objection.

7 THE COURT: Overruled.

8 You can answer that if you know.

9 A. Yes, sir. They were in the government's possession.
10 That's how I received them during production of evidence
11 prior to the commencement of our trial.

12 Q. Now, we can say these documents have not been offered
13 by the government up to this point. It's not --

14 MR. CONWAY: Objection, your Honor.

15 MR. HALEY: Well, quick thought -- I withdraw
16 that, Judge. I withdraw the comment.

17 Judge, may I approach?

18 THE COURT: Go ahead.

19 Q. Would you kindly take a look at Kenner Exhibit F-27.

20 (Handing.)

21 And what is that?

22 A. This is the e-mail that I was referring to earlier
23 that Mr. Najam sent to myself, Mr. Jowdy, his Mexican
24 attorney, Fernando Garcia, which is the FMGC@Talmur.net,
25 as well as Mr. Jowdy's permitting specialist, the e-mail

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1 is greg@ddmgolf.com, where Mr. Najam tells me -- tells us,
2 excuse me, on February 6th that \$6.25 million had been
3 paid to the seller, which is about \$400,000 short of the
4 e-mail the government showed me prior to this of \$6.6
5 million. And it confirms that all of the funds for the
6 Cabo property project had to be referred to as investments
7 and not as loans. And I think that I referenced earlier
8 that e-mail trafficking communication between myself,
9 Mr. Najam, Mr. Jowdy occurred on February 5th and February
10 6th, at which time Mr. Najam realized that Mr. Jowdy had
11 borrowed all of the funds, so he was just relating that in
12 an e-mail since he was the only legal counsel for Lehman
13 Brothers.

14 MR. HALEY: Judge, the contents have been
15 testified to, but I offer this e-mail as Kenner Exhibit
16 F-17.

17 MS. LEONARDO: No objection, your Honor.

18 THE COURT: Mr. Conway, any objection?

19 MR. CONWAY: No objection, your Honor.

20 THE COURT: F-27 is admitted.

21 (Defendant's Exhibit F-27 in evidence.)

22 MR. HALEY: And I apologize to the Court and to
23 you as well, if this becomes repetitive.

24 Q. But when he said they must be characterized as
25 investments rather than loans, what did he mean by that?

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1 A. Mr. Najam had just begun the accounting process on
2 February 5th to determine where the \$6 plus million that
3 had gone to the seller, and apparently with his
4 conversations with Lehman Brothers and their attorneys
5 they needed to know the source of all of those funds. So
6 Mr. Jowdy told Mr. Najam for the first time that he had
7 been borrowing the funds from myself, Joseph Stompel,
8 Mattias Norstrum and the Hawaiian Land Development
9 partners, and Mr. Najam wanted to clarify that with
10 respect to the equity position we were taking in the Cabo
11 San Lucas project that Mr. Jowdy needed to refer to all of
12 the loans as investments.

13 Q. But if that reference was made in connection with the
14 loan application to the Lehman Brothers, it would have
15 been untrue, correct, that they were investments rather
16 than loans?

17 MS. LEONARDO: Objection, your Honor.

18 THE COURT: Overruled.

19 You can answer that.

20 A. That is correct. In fact, the -- if I recall
21 correctly, the January 2006 letter of intent memorandum of
22 understanding between Lehman Brothers and our purchasing
23 parties refers to the money asked to be investments, and
24 they specifically added it cannot be loans.

25 Q. You didn't partake in the application process for the

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1 loan to Lehman Brothers for purposes of the Mexican
2 project, did you?

3 A. No.

4 MS. LEONARDO: Objection.

5 THE COURT: Overruled.

6 A. No. I didn't see any of those documents until after
7 I was arrested. Seven years later.

8 (Document handed to the witness.)

9 MR. HALEY: Again, may I approach, Judge? I'm
10 close to finishing, your Honor.

11 Q. Phil, kindly take a look at Kenner Exhibit F-28.

12 What is that?

13 A. This is a Diamonte del Mar balance sheet that had
14 been turned over to us in evidence by Mr. Jowdy and his
15 attorneys in the California lawsuits. It was a balance
16 sheet that was created by Mr. Jowdy's accountant,
17 assistant Mark Thalman on December of '09. This was put
18 together approximately a year and a half after I filed the
19 Little Isle IV Ula Makika lawsuit in Arizona for the
20 unpaid loans, to which Jowdy's initial defense was none of
21 the money were loans.

22 Q. What were they as you represented in that
23 transaction, in that proceeding?

24 A. Mr. Jowdy originally in his response stated that all
25 of those monies were given to his entities were

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1 investments in his shell corporations.

2 Q. Was that a true representation on his part?

3 A. No, sir. In fact, when we made our first request for
4 discovery for those 10 plus or minus LLCs for K1's, tax
5 records, operating agreements representing the \$5 million
6 of the outstanding funds sent to Mr. Jowdy, that's when
7 they immediately initiated their attack on us for a
8 request for a motion for expedited discovery to stall our
9 ability to ferret out the 10 corporations Mr. Jowdy
10 alleged in his defense were his -- were investments he
11 made in the shell corporations that, frankly, had no
12 assets.

13 Q. Well, as relates to Kenner Exhibit F-28, do you see
14 the notation Little Isle and Ula Makika on that document?

15 A. Yes, sir, I do.

16 Q. And you interpret the -- following the numbers there
17 to be reflective of investments or loans?

18 A. This is Mr. Jowdy's balance sheet. This was not
19 turned over to us during the Arizona case admitting the
20 loans that were made to Diamonte del Mar. It contradicts
21 his defense in the Arizona case. But once that case was
22 dismissed, they turned over this document that recognizes
23 a \$795,000 loan from Little Isle IV to Diamonte del Mar,
24 and a \$50,000 net loan from Ula Makika to Diamonte del
25 Mar.

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1 Q. Phil, speaking of the same loans, was there ever a
2 representation made to you by Ken Jowdy as to when those
3 loans were being paid?

4 A. Yes. According to the revolving line of credit
5 agreement, the loans were due and payable at such time
6 that Mr. Jowdy had arranged for development financing at
7 either the Diamonte del Mar project, or the Diamonte Cabo
8 San Lucas project, whichever came first.

9 I also believe since some of the hard money
10 tenders were looking to do smaller loans that would not
11 cover our entire outstanding balance. Mr. Jowdy had asked
12 that I put a provision in there that he could execute only
13 a repayment of half of the principal outstanding, at which
14 time he got a loan for either the Diamonte Cabo San Lucas
15 or the Diamonte del Mar project.

16 He never notified us on February 21st of 2006
17 that he had received the KSI loan for \$3 million that we
18 spoke about previously, otherwise we would have demanded a
19 \$3 and a half million dollar paydown to the \$3 million
20 loan pursuant to the loan agreement. We didn't find out
21 about that loan until a year later when Mr. Constantine
22 was negotiating with Mr. Jowdy.

23 Q. Is there any e-mail in existence that references --
24 well, you've testified to it being part of the loan
25 agreement that the money would be paid back upon the Cabo

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1 San Lucas -- or del Mar, I apologize -- I apologize.

2 Which closing are we speaking of?

3 A. Either/or. It was written as -- because we were
4 pursuing financing for Mr. Jowdy for both projects at the
5 same time that as a result of either of those fundings
6 occurring, that Mr. Jowdy would pay us back, and it's laid
7 out -- the document that lays it out is the loan agreement
8 that I constructed after the discussion with Mr. Jowdy how
9 he wanted to handle it.

10 Q. Is there any e-mail in existence that makes any
11 reference to the repayment of the loan upon the closing of
12 the Lehman Loan?

13 A. No. Not that I have seen. But I haven't seen any of
14 my e-mails that were on my laptop since the time I was
15 arrested. They were never turned over to me.

16 Q. Well, let me show you what's been marked Kenner
17 Exhibit 29.

18 THE COURT: Did you want to introduce 28?

19 MR. HALEY: Yes, Judge, thank you. I would
20 introduce 28. Thank you, your Honor. That's my
21 oversight.

22 THE COURT: Any objection?

23 MS. LEONARDO: No objection.

24 MR. CONWAY: No objection.

25 THE COURT: 28 is admitted.

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1 (Defendant's Exhibit 28 in evidence.)

2 MR. CONWAY: Your Honor, I'm going to give the
3 Court a document that I will be referring to in a moment.
4 It is not in ready, readable form because of the nature in
5 which it was reproduced, but if the Court could bear
6 with me, I'm going to have my client interpret what, I
7 believe, one will be able to see if it's examined closely.

8 Q. Mr. Kenner, would you kindly take a look at what's
9 Kenner Exhibit F-29.

10 | What is that document? (Handing.)

11 A. This is an e-mail from myself to Bill Najam and
12 Ken Jowdy on February 23rd, 2006, which coincides with the
13 day that Mr. Markowitz formed Baja Ventures 2006, on
14 behalf myself, Mr. Stompel and Mr. Lehtinen.

At this point in time, Mr. Jowdy had not informed us that he was not paying out the Hawaii payoffs. At this point in time, he only informed us he was not paying off Mr. Stompel and Mr. Lehtinen's funds. So I wrote to Bill Najam on that top line, "Bill, the managing member role" --

21 MS. LEONARDO: Objection, not in evidence.

22 MR. HALEY: Judge, the reason that I haven't
23 offered it formally is I admit that it's not in readily
24 readable form, but I believe --

25 THE COURT: We'll deal with the reading first in

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1 terms what authentication --

2 You sent this e-mail to Mr. Najam?

3 A. Yes, WJN1434@AOL.com is Mr. Najam's address.

4 THE COURT: Any objection?

5 MR. CONWAY: No, your Honor.

6 MS. LEONARDO: No, your Honor.

7 THE COURT: F-29 is admitted. And now you can
8 read it. Go ahead.

9 (Defendant's Exhibit F-29 in evidence.)

10 A. The top line says, "Bill: The managing member role
11 for KJ," which is Ken Jowdy, "on Diamonte properties is
12 fine considering, quote, 'all funds will be paid,' un
13 quote. Please make sure I see some. Thanks."

14 Q. And as a result of that e-mail, did you ever receive
15 a response?

16 A. Not that I recall.

17 MR. HALEY: Thank you.

18 THE COURT: Okay. Do you have any recross?

19

20 RECROSS-EXAMINATION

21 BY MS. LEONARDO:

22 Q. Mr. Kenner, you just testified that Mr. Gaudet gave a
23 deposition in the Little Isle IV Jowdy lawsuit, correct?

24 A. That is correct.

25 Q. Actually, what you said in that deposition transcript

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1 was that he remembered signing a document, but he could
2 not identify the loan document; isn't that correct?

3 A. All I can recall from that July 2nd, 2009 deposition
4 is Mr. Gaudet confirming on approximately 10 different
5 occasions that he had signed and witnessed the loan
6 agreement between Mr. Jowdy and myself.

7 Q. Mr. Kenner, what Mr. Gaudet actually said was he did
8 not recall that document. He recalled seeing something,
9 but not that document; isn't that what he testified to?

10 A. I don't believe that to be accurate.

11 MR. CONWAY: Your Honor, if you'd like, I have
12 the deposition downstairs. I can bring it back up and
13 submit it to the Court in writing.

14 MR. HALEY: Judge, if I may, it is our
15 intention, I think the Court ought to have all the
16 deposition exhibits and testimony that relates to what
17 persons said about the legitimacy and authenticity of that
18 loan document for the Court's consideration, so I have no
19 objection.

20 THE COURT: Yes, I'd like to read it. Okay.

21 MS. LEONARDO: I'll do that in writing,
22 your Honor.

23 MR. HALEY: Judge, in addition, of course, we'll
24 be introducing the deposition -- well, deposition
25 transcript from the AAA proceedings has already been

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1 introduced. I'm just reserving my right to introduce the
2 testimony as adduced at trial that was referred to where
3 Mr. Jowdy and his attorneys introduced that document,
4 actually identified as Exhibit 89-A as an authentic
5 document.

6 THE COURT: I'd like to see that, too, if you
7 have it.

8 MR. CONWAY: Your Honor, I do just have one
9 other question.

10 Q. Mr. Kenner, with regards to what is marked as Exhibit
11 F-29 --

12 A. I'm sorry, I couldn't understand what you said.

13 Q. With regard to what your attorney just marked as
14 Exhibit F-29, did you respond to this e-mail? Did either
15 of you respond to this e-mail? Where are the other
16 e-mails in this e-mail chain?

17 THE WITNESS: Your Honor, I'm not sure what I'm
18 supposed to answer.

19 THE COURT: She just wants to know if there are
20 other e-mails relating to this e-mail, F-29? Are there
21 other e-mails that are related to this e-mail?

22 A. With respect to this e-mail chain, it's a
23 never-ending e-mail chain with some of the exhibits that
24 you showed me over the last two days, and continues right
25 through the closing of the Cabo San Lucas project on

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1 behalf of state.

2 Q. Where did you get this e-mail from?

3 A. This was turned over by the government to us in
4 pretrial.

5 Q. And there aren't any numbers on the bottom. In what
6 production was that?

7 A. I don't know. But I didn't have any of my own
8 production. All the production came in through the
9 government. I haven't had access to any of my standard
10 advise of e-mails since 2007.

11 Q. Mr. Kenner, on February 23rd, 2006, you were told
12 your clients were not going to have -- the loans were not
13 going to be part of the Mexico payout; is that right?

14 A. No, that's incorrect.

15 Q. Mr. Lehtinen and Stompel were not going to be part of
16 the payout in March 2006; is that correct?

17 A. That's correct. I was informed that on or about
18 February 20th, as I stated earlier today.

19 MS. LEONARDO: I have no further questions,
20 your Honor.

21 THE COURT: All right. You can step down,
22 Mr. Kenner. Thank you.

23 THE WITNESS: Thank you, your Honor.

24 THE COURT: So, Mr. Haley, other than submitting
25 these documents, you rest?

1 MR. HALEY: Yes, sir.

2 THE COURT: Okay. And the question is the five
3 minutes with Agent Wayne? I can't -- I don't have time to
4 do it now.

5 MR. CONWAY: We can break at this point, Judge.
6 We've bot about 15, 20 minutes maybe.

7 THE COURT: Okay. So -- and then that's all you
8 have?

9 MR. CONWAY: And then we'll rest.

10 THE COURT: I can do it tomorrow morning, if you
11 want to get it done.

12 MR. CONWAY: Judge, can we take a two-minute
13 break, and then we'll do some scheduling?

14 THE COURT: Yes. I do also at this -- and I
15 obviously note the government wants to put in something in
16 writing to summarize the forfeiture aspect, but I also do
17 want to at some point have the AUSAs that were doing the
18 criminal part of the case to discuss this issue of the
19 Fatico hearing because Mr. Kelly requested, and I think
20 it's a reasonable request that he doesn't want to have to
21 do two submissions, one on forfeiture, one on Fatico
22 hearing. If the government intends to have a Fatico
23 hearing to try to prove up some additional fraud, I want
24 to know about that.

25 MR. CONWAY: Your Honor, I did speak with

1 Ms. Komatireddy today, and she indicated that once we get
2 the objections to PSR, we will know better if we're going
3 do it -- if we can join forfeiture and Fatico briefs or
4 restitution briefs.

5 THE COURT: No. I don't think it makes sense.
6 I think the objection -- I mean, they may have individual
7 objections to a lot of things in the PSR. But we know
8 what the objection is as relates to the Fatico hearing as
9 with Mr. Haley, any fraudulent scheme that was not -- that
10 is in the PSR as relevant conduct that was not proved up
11 at the trial.

12 There were three schemes that the government put
13 on evidence of during the trial. If the government
14 intends for any other scheme, whether it be the Palms or
15 anything else be considered by me at sentencing, my view
16 is that we need a hearing. So I don't think we need to
17 have Mr. Haley put in objections to deal with that.

18 MR. CONWAY: I guess your Honor, then, we need
19 to schedule a conference when Ms. Komatireddy will be
20 here. She couldn't be here today.

21 THE COURT: Okay. You want two minutes?

22 MR. CONWAY: Two minutes, Judge.

23 THE COURT: Okay.

24 (Recess taken at this point.)

25 (After recess.)

1 MR. CONWAY: Your Honor, if I may, in light of
2 the testimony today and on Monday and given the inevitable
3 fact that we're probably going to have a Fatico hearing,
4 we're prepared to rest today.

5 THE COURT: You're oh so pessimistic about that
6 I have to hear from Ms. Komatireddy.

7 Okay. So everybody is resting on the
8 forfeiture, correct?

9 MR. CONWAY: Correct.

10 MR. CONWAY: Yes, sir.

11 THE COURT: So what do you want to do? Do you
12 want to --

13 MR. CONWAY: I have two things, Judge. In terms
14 of the forfeiture hearing, do you want something in
15 writing from the parties?

16 THE COURT: Yes, I do want something in writing
17 from the parties. I'll ask the government to submit
18 first, and you both can respond. But I'm concerned about
19 this outstanding Fatico issue.

20 MS. LEONARDO: My second suggestion is in the
21 absence of Ms. Komatireddy today, perhaps Mr. Haley and I
22 can talk to her in the next day or so and present
23 your Honor with a schedule.

24 MR. HALEY: I have another suggestion.

25 Mr. Conway and I haven't spoken, but I did speak with the

1 government, Judge. I believe very shortly, if it hasn't
2 occurred already, there's going to be an entry on your
3 calendar for oral argument on Mr. Constantine's Rule 29.
4 It think it's coming up in a couple of weeks.

5 Ms. Komatireddy will be here. I will be here. Mr. Conway
6 will be here. I believe on that date we'll be in a better
7 position with all the parties we can look for a briefing
8 schedule thereafter. That seems to be an opportune time
9 to do it.

10 THE COURT: How far off is that?

11 MR. HALEY: I think it's the time of April --

12 MR. CONWAY: Your Honor, I believe it's the last
13 week of April.

14 MR. HALEY: Yes.

15 THE COURT: Okay. I would like the government
16 -- you don't need this issue about the Fatico hearing to
17 be resolved to get the forfeiture submission. It's
18 independent of that.

19 MS. LEONARDO: Yes, your Honor.

20 THE COURT: I just don't want too much time to
21 go by.

22 MR. HALEY: Fine, Judge. I'll show up whenever.

23 THE COURT: How long do you need for the
24 forfeiture submission?

25 MS. LEONARDO: 45 days.

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1 THE COURT: Okay. That's fine. So, May 20th,
2 and I'm just going to leave no date for your response.
3 We'll figure out the response date once we hear from
4 Ms. Komatireddy about this Fatico issue. Okay.

5 MR. HALEY: That's very fair. Thanks, Judge.

6 THE COURT: And obviously you should start
7 preparing your objections to the PSR. Don't wait. Okay?

8 MR. HALEY: I won't, your Honor. The only thing
9 I'll say is my focus has been on other matters. I assure
10 you I will be responding to the presentence report.

11 There's no question about that.

12 MR. CONWAY: As we will, your Honor.

13 THE COURT: All right. Anything else?

14 MS. LEONARDO: Nothing from the government,
15 your Honor.

16 THE COURT: Okay. Thank you. Have a good
17 night.

18 (Matter concluded.)

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